Rebuttal Testimony of James C. Falvey

Exhibit 4

Alabama Public Service Commission Orders

In the Matter of:	) **DOCKET 27069**
Petition by ICG Telecom Group, Inc. for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996	)

FINAL ORDER ON ARBITRATION

BY THE COMMISSION:

HEARD : Wednesday August 11, 1999, Commission Hearing Room 904, RSA Union Building, 100 North Union Street, Montgomery, Alabama

BEFORE: The Honorable John A. Garner- Arbitration Facilitator, Mr. David House - Arbitrator, and Jimmy B. Pool, Esq.- Arbitrator

APPEARANCES:

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I. INTRODUCTION/BACKGROUND

This arbitration proceeding is pending before the Alabama Public Service Commission (the "Commission") pursuant to Section 252(b) of the Telecommunications Act of 1996 (the "Act"). This proceeding was initiated by ICG Telecom Group, Inc.'s ("ICG") filing of a *Verified Petition For Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc.* ("BellSouth") *Pursuant to Section 252(b) of the Telecommunications Act of 1996* (the "Petition") on May 27, 1999. In said Petition, ICG requested that the Commission arbitrate certain terms and conditions with respect to an interconnection agreement between itself as the petitioning party, and BellSouth. On June 21, 1999, BellSouth filed its *Verified Response to ICG's Petition For Arbitration* (the "Response").

In accordance with the Commission's Telephone Rule T-26(C), the Commissioners appointed The Honorable John A. Garner, Administrative Law Judge, as Arbitration Facilitator, and Mr. David House, Public Utilities Auditor III, and Jimmy B. Pool, Esq. as Arbitrators in this Matter (collectively the "Arbitration Panel" or "Panel").

On July 1, 1999, ICG and BellSouth submitted a Joint Motion to Establish a Procedural Schedule. Through a Procedural Ruling issued on July 16, 1999, the Arbitration Panel set forth a discovery schedule, established a Status Conference to be held on July 23, 1999, and ordered the Arbitration hearing to begin on August 9, 1999. On July 8, 1999, a discovery conference was held during which oral presentations concerning outstanding discovery disputes were heard. An Oral Ruling resolving the outstanding discovery disputes was entered on July 9, 1999. The findings rendered in the July 9, 1999 Oral Ruling were ratified by a written ruling issued on July 16, 1999.

On July 23, 1999 the Status Conference was held as scheduled. In an effort to reduce the number of controverted issues, the parties engaged in informal mediation immediately following the Status Conference. The mediation was conducted by Ms. Judy McLean, Director of the Commission's Advisory Division.

By agreement of the Arbitration Panel and the parties, the Arbitration hearing was continued until August 11, 1999, to permit the continuation of an informal Mediation session conducted by Ms. McLean. As a result of the mediation efforts of Ms. McLean, and the parties, the list of Issues requiring arbitration was reduced from twenty-six (26) to five (5). At the outset of the Arbitration hearing, ICG and BellSouth submitted to the Arbitration Panel a *Statement of Partial Settlement* in which the parties informed the Panel that they had resolved all but the following Issues:

1. Until the FCC âdopts a rule with prospective application, should dial-up calls to Internet service providers (ISPs) be treated as if they were local calls for purposes of reciprocal compensation?

2. For purposes of reciprocal compensation, should ICG be compensated for end office, tandem and transport elements of termination where ICG's switch serves a geographic area comparable to the area served by BellSouth's tandem switch?

3. Should BellSouth be required to commit to provisioning the requisite network buildout and necessary support when ICG agrees to enter into a binding forecast of its traffic requirements in a specified period?

4. Should BellSouth be required to provide the "Enhanced Extended Link" as a UNE combination (EEL)?

5. Should volume and term discounts be available for UNEs?

At the August 11, 1999 hearing, ICG offered the testimony of Michael Starkey, President of the telecommunications consulting firm of Quantitative Solutions, Inc.; Philip Jenkins, ICG's Senior Director - Engineering and Operations for the Southeast Region; Bruce Holdridge, Vice President of Government Affairs for ICG Communications, Inc.; and Cindy Schonhaut, Executive Vice President for Government and Corporate Affairs for ICG Communications, Inc. BellSouth offered the testimony of Alphonso Varner, the company's Senior Director for State Regulatory.

At the conclusion of the August 11, 1999 hearing, the parties indicated a preference to submit post-Arbitration hearing briefs. In order to accommodate the filing of those briefs, the parties orally agreed on the record at the August 11, 1999 proceeding to jointly extend the statutory deadline for the Commission's decision in this matter as set forth at 47 U.S.C. §252(b)(4)(C). Both parties submitted simultaneous post-Arbitration hearing briefs.

The Arbitration Panel issued its Arbitration Panel Recommendation and Proposed Order Regarding Interconnection Agreement (the Arbitration Panel's Recommendation) on October 13, 1999. The Arbitration Panel's Recommendation set forth recommendations for the resolution of the issues set forth in the Petition and Response which remained open.

Pursuant to the Commission's Telephone Rule T-26, the Arbitration Panel's Recommendation was served on the parties to the Arbitration as well as all parties on the Commission's Telecommunications service list. Although Telephone Rule T-26(I)(2) allows interested parties who were not parties to the Arbitration to file comments concerning the Arbitration Panel's Recommendation within 10 days, and allows the parties to the Arbitration to submit replies to those comments and any exceptions to the Arbitration Panel's Recommendations in a subsequent 10 day period, the Arbitration Panel accompanied the service of its Recommendation with a Procedural Ruling requiring initial comments to be submitted no later than October 22, 1999. The Procedural Ruling required that reply comments/exceptions by the parties be filed no later than October 28, 1999. As set forth in the Procedural Ruling, the modification of the comment cycles was necessary to accommodate the rendering of a decision by the Commission in this matter at the November 1, 1999 meeting of the Commission.

The Commission received comments from the following interested non-parties: GTE South, Incorporated (GTE); e.spire Communications, Inc. (e.spire); AT&T Communications of the South Central States, Inc. (AT&T); Sprint Communications Company, L.P. (Sprint); a joint filing by Hyperion Communications, Inc./KMC Telecom, Inc.; and a joint filing from MCI WorldCom, Inc./ITC DeltaCom Telecommunications, Inc. In addition, BellSouth and ICG each submitted reply comments/exceptions. The Commission also received a recommendation concerning the findings, conclusions and recommendations of the Arbitration Panel from the Commission's Advisory Division.

After careful consideration of the entire record in this matter including the post-Arbitration hearing briefs filed by the parties, the Arbitration Panel's Recommendation, the comments of the parties and interested non-parties, and the recommendation of the Advisory Division, we render the findings and conclusions set forth below. Due to the fact that we largely concur with the findings, conclusions and recommendations of the Arbitration Panel, we have for the most part adopted the Arbitration Panel's Recommendation as our final Order in this cause. Our specific findings and conclusions as to each issue are, however, specifically set forth.

II. FINDINGS AND CONCLUSIONS

ISSUE NO. 1: UNTIL THE FCC ADOPTS A RULE WITH PROSPECTIVE APPLICATION, SHOULD DIAL-UP CALLS TO INTERNET SERVICE PROVIDERS ("ISPs") BE TREATED AS IF THEY WERE LOCAL CALLS FOR PURPOSES OF RECIPROCAL COMPENSATION (PETITION ISSUES 1 AND 8).

The ICG Position

ICG argues that while the FCC found in its *Declaratory Ruling and Notice of Proposed Rulemaking in CC Docket 96-98*, released on February 26, 1999 (the FCC's "*ISP Declaratory Ruling*"), that ISP traffic is mostly interstate in nature, the FCC stated that, until a federal rule is adopted concerning inter-carrier compensation for ISP-bound calls, state commissions have the authority in an arbitration to conclude that reciprocal compensation is an appropriate compensation mechanism. Notwithstanding the jurisdictional nature of ISP-bound calls, ICG argues that the Commission has the authority to set a rate for this traffic by virtue of its 47 U.S.C. §252 authority over interconnection agreements which extends to both intrastate and interstate matters.

ICG points out that the FCC has treated ISP-bound traffic as local for purposes of interstate access charges and in fact stated in the *ISP Declaratory Ruling* that this treatment would suggest that reciprocal compensation is due for such traffic. According to ICG, the FCC has made it clear that the question regarding ISP traffic is not whether compensation will be provided, but what rate of compensation is appropriate.

ICG maintains further that public policy supports payment of reciprocal compensation for ISP-bound traffic. ICG notes that ISPs are an important market segment for competing local exchange carriers ("CLECs") and a segment of the local exchange market that is well on its way toward effective competition. ICG represents that an elimination of its ability to recover its costs for transport and delivery of BellSouth-originated calls to ICG-served ISPs will negatively affect the development of local competition. Starkey, Tr. pp. 53-54.

ICG argues that requiring carriers to pay reciprocal compensation for the transport and delivery of ISP-bound calls is economically efficient. According to ICG, BellSouth should be economically indifferent as to whether BellSouth incurs the transport and delivery costs directly or through a reciprocal compensation arrangement with ICG because BellSouth's rates for transport and delivery are based upon BellSouth's underlying costs. Starkey, Tr. pp. 59-60.

ICG alleges that BellSouth's recommendation for addressing ISP traffic pending adoption of a federal rule is unreasonable. Specifically, ICG asserts that BellSouth's proposal that carriers track ISP traffic and retroactively apply whatever rate is ultimately adopted by the FCC would deprive ICG of compensation for services it provides now, thereby ignoring the time value of money. Schonhaut, Tr. p. 315.

ICG further asserts that there is no guarantee as to when the FCC will adopt a federal rule governing inter-carrier compensation for ISP-bound traffic. ICG contends that the FCC has indeed indicated that it may leave this issue to the states to decide. ICG further stresses that there is the possibility, if not the likelihood, that the FCC rule will be prospective in a way that permanently deprives ICG of compensation for traffic carried in the interim between this Commission's ruling and the FCC's ruling. Schonhaut, Tr. p. 311.

The BellSouth Position

According to BellSouth, the FCC's February 26, 1999 *ISP Declaratory Ruling* affirmed that the FCC has, and will, retain jurisdiction over ISP-bound traffic. BellSouth maintains that the FCC has now conclusively established that ISP-bound traffic is non-local interstate traffic due to the fact that most calls to ISPs terminate at distant exchanges in other states as opposed to local exchanges. Since the 47 U.S.C. §251(b)(5) obligation to pay reciprocal compensation has been interpreted by the FCC to apply only to traffic that originates and terminates within the local exchange, BellSouth concludes that interstate ISP traffic is not subject to reciprocal compensation. Given that conclusion, BellSouth urges that there is no basis for requiring a compensation mechanism for ISP-bound traffic in an arbitration conducted pursuant to 47 U.S.C. §252 since that section of the Act only gives state commissions jurisdiction over areas within the scope of 47 U.S.C. §251. Varner, Tr. p. 397.

BellSouth further argues that while the FCC's *ISP Declaratory Ruling* appears to give states authority to create an interim compensation mechanism pending adoption of a federal rule governing that subject, the interim authority granted states by the FCC is being challenged in court. If this challenge is successful, BellSouth contends that the Commission could find that it does not have even interim authority to implement a compensation mechanism for ISP traffic. BellSouth accordingly urges that it would be a wasted effort for the Commission to undertake the establishment of an interim compensation mechanism for ISP traffic under such circumstances. Even if the Commission's interim authority to impose an interim ISP compensation mechanism withstands challenge, BellSouth points out that it will only be valid until the FCC adopts a federal rule.

BellSouth further argues that the Commission should not require reciprocal compensation for ISP-bound traffic under any circumstances because ISP-bound traffic is interstate "access" traffic which is not subject to reciprocal compensation. BellSouth accordingly contends that a portion of the rates that ISPs pay ICG for their monthly business service should be shared with BellSouth as "access" revenues. Varner Tr. p. 421-422.

If, in spite of the aforementioned arguments, the Commission determines that it has jurisdiction to implement an interim inter-carrier compensation mechanism and that such a mechanism is warranted for ISP-bound traffic, BellSouth urges the implementation of the mechanism proposed by BellSouth witness Varner. Tr. pp. 395-396. The mechanism proposed by Mr. Varner would require the parties to track ISP-bound calls originating on their respective networks on a going-forward basis and to abide by any final and non-appealable FCC ruling on the issue of inter-carrier compensation for ISP calls. Any inter-carrier compensation mechanism established by the FCC would apply retroactively from the date of the interconnection agreement entered between ICG and BellSouth. The parties would be required to "true up" any compensation due for ISP-bound calls based on the FCC's final, non-appealable ruling.

The Arbitration Panel's Discussion of Issue No. 1

The fact that both ICG and BellSouth devoted the major portion of their respective post-Arbitration hearing briefs to a discussion of the treatment of ISP-bound traffic is demonstrative of the critical importance of this issue to each party. The issue is also of critical importance to the Commission given its potential impact on the development of competition in this state. The decision reached on ISP-bound traffic in this proceeding will have a broad impact on the issue in Alabama generally because this case will establish precedence concerning future treatment of ISP-bound traffic.

Our analysis concerning this issue logically begins with an assessment of our jurisdictional authority concerning compensation for ISP-bound traffic in light of the FCC's February 26, 1999 *ISP Declaratory Ruling*. BellSouth is correct in pointing out that the FCC, in that ruling, concluded that ISP-Bound traffic is jurisdictionally mixed and appears to be largely interstate. BellSouth is also correct in noting that the FCC concluded that since ISP traffic is jurisdictionally non-local interstate traffic, the reciprocal compensation obligations of 47 U.S.C. §251(b)(5) do not cover inter-carrier compensation for ISP-bound traffic. From that, however, BellSouth improperly concludes that state commissions do not have authority to address reciprocal compensation for ISP-bound calls in 47 U.S.C. §252 arbitration proceedings since that section of the Act only gives state Commissions jurisdiction over areas within the scope of 47 U.S.C. §251. What BellSouth casually and improperly discounts is the fact that the FCC specifically recognized the authority of state Commissions under 47 U.S.C. §252 to determine inter-carrier compensation for ISP-bound traffic and to impose reciprocal compensation obligations in arbitration proceedings in the absence of a federal rule to the contrary.

By way of background, the FCC specifically recognized in its *ISP Declaratory Ruling* that while ISP-bound traffic is jurisdictionally interstate, the FCC will continue, as it has in the past, to discharge its interstate regulatory obligations regarding ISP-bound traffic by treating that traffic as though it is local. The FCC also specifically recognized that in light of its continued policy of exempting ISP-bound traffic from the imposition of access charges, it has created something of an inter-carrier compensation void for ISP-bound traffic by finding in the *ISP Declaratory Ruling* that such traffic is largely interstate and, therefore, not subject to the reciprocal compensation obligations of 47 U.S.C. §251(b)(5). Given that void, the FCC recognized that the establishment of a rule governing inter-carrier compensation for ISP-bound traffic would serve the public interest. The FCC concluded, however, that the record it had before it in the *ISP Declaratory Ruling* proceeding was insufficient for the adoption of such a rule. The FCC accordingly issued a Notice of Proposed Rulemaking concerning the promulgation of such an inter-carrier compensation rule for ISP-bound traffic.

For purposes of this arbitration, it is important to note that the FCC specifically held that prior to the establishment of a federal rule governing inter-carrier compensation for ISP-bound traffic, state Commission's could determine in arbitration proceedings that reciprocal compensation should be paid for ISP-bound traffic. In arriving at that conclusion in its *ISP Declaratory Ruling*, the FCC reasoned that:

> "Section 252 imposes upon state commissions the statutory duty to approve voluntarily-negotiated interconnection agreements and to arbitrate interconnection disputes. As we observed in the *Local Competition Order*, state commission authority over interconnection agreements pursuant to §252 "extends to both interstate and intrastate matters." Thus, the mere fact that ISP-bound traffic is largely interstate does not necessarily remove it from the Section 251/252 negotiation and arbitration process. However, any such arbitration must be consistent with governing federal law. While to date the Commission has not adopted a specific rule governing the matter, we note that our policy of treating ISP-bound traffic as local for purposes of interstate access charges would, if applied in the separate context of reciprocal compensation, suggest that such compensation is due for that traffic." *Id. at & 25.*
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> "As we stated previously, the Commission currently has no rule addressing the specific issue of inter-carrier compensation for ISP-bound traffic. In the absence of a federal rule, state Commission's that have had to fulfill their statutory obligation under §252 to resolve interconnection disputes between incumbent LECs and CLECs have had no choice but to establish an inter-carrier compensation mechanism and to decide whether and under what circumstances to require the payment of reciprocal compensation. Although reciprocal compensation is mandated under section 251(b)(5) only for the transport and termination of local traffic, neither the statute nor our rules prohibit a state Commission from concluding in an arbitration that reciprocal compensation is appropriate in certain instances not addressed by section 251(b)(5), so long as there is no conflict with governing federal law. A state commission's decision to impose reciprocal compensation obligations in an arbitration proceeding--or a subsequent state Commission decision that those obligations encompass ISP-bound traffic--does not conflict with any Commission rule regarding ISP-bound traffic." *Id. at & 26.*

We note that this Commission has previously had occasion to consider the FCC's *ISP Declaratory Ruling* and its impact on the Commission's jurisdiction concerning ISP-bound traffic. In an Order entered on March 4, 1999 in Docket 26619, the Commission held that it had jurisdiction to determine the reciprocal compensation obligations of the parties to the agreements under review in that proceeding concerning ISP-bound traffic. The Commission further found that the exercise of that jurisdiction was totally consistent with the FCC's *ISP Declaratory Ruling.* Similarly, in an Order on Reconsideration entered in that same proceeding on June 21, 1999, the Commission specifically noted the FCC's recognition at & 24 and & 26 of its *ISP Declaratory Ruling* that state Commission's have wide latitude to decide the issue of payment for ISP-bound traffic pursuant to existing interconnection agreements or through arbitrations.

We also note that some 16 other state commissions have addressed the issue of whether reciprocal compensation should apply to ISP-bound traffic since the FCC issued its *ISP Delcaratory Ruling*. Of those 16 state commission's that have rendered decisions on the merits of the applicability of reciprocal compensation to ISP-bound traffic, 15 have upheld the application of reciprocal compensation to such traffic. Three additional states have decided to withhold the issuance of a final ruling concerning inter-carrier compensation for ISP-bound traffic until the FCC further addresses the issue. To date, only one state has expressly declined to require reciprocal compensation for ISP-bound traffic.

In addition to the aforementioned state commission's, all four of the federal courts that have issued decisions addressing appeals of state commission decisions requiring reciprocal compensation for ISP-bound traffic after the release of the FCC's *ISP Declaratory Ruling* have upheld the determinations of the applicable state commissions. The four courts include the United States Court of Appeals for the Seventh Circuit and three district courts, including the Federal District Court for the Middle District of Alabama.

The opinion of the Seventh Circuit upholding a decision of the Illinois Commerce Commission which required the payment of reciprocal compensation for ISP-bound traffic pursuant to existing interconnection agreements is particularly enlightening. Specifically, the Seventh Circuit Court stated that "[The] FCC could not have made clearer its willingness--at least until the time a [FCC] rule is promulgated--to let state Commissions make the call. We see no violation of the Act in giving such deference to state Commissions; in fact the Act specifically provides state Commissions with an important role to play in the field of interconnection agreements".

Although the Seventh Circuit's opinion in *Illinois Bell* involved the review of an Illinois Commerce Commission decision interpreting existing interconnection agreements, we see little or no distinction in the applicability of the Seventh Circuit's reasoning to post-*ISP Declaratory Ruling* arbitration proceedings conducted pursuant to 47 U.S.C. §252. It is apparent that the FCC envisioned state action concerning the applicability of inter-carrier compensation for ISP-bound traffic in such arbitrations pending the promulgation of a federal rule and even thereafter. In fact, the FCC specifically noted at & 30 of the *ISP Declaratory Ruling* the following:

> "We tentatively conclude that, as a matter of federal policy, the inter-carrier compensation for this interstate telecommunications traffic should be governed prospectively by interconnection agreements negotiated and arbitrated under sections 251 and 252 of the Act. Resolution of failures to reach agreement on inter-carrier compensation for interstate ISP-bound traffic then would occur through arbitrations conducted by state Commissions, which are appealable to federal district courts." *Id.*

Having determined that the Commission has the appropriate jurisdiction to address the issue of inter-carrier compensation of ISP-bound traffic and to in fact require that such compensation be paid in the form of reciprocal compensation, our analysis now turns to an assessment of whether it is prudent to exercise that jurisdiction at this juncture. BellSouth urges that since the FCC'S *ISP Declaratory Ruling* is currently subject to a court challenge, states could find that they do not have the authority to create even an interim compensation arrangement. BellSouth further asserts that even if the states do have the authority, such authority is valid only until the FCC completes its rulemaking on the subject. Therefore, any effort devoted by this Commission to establishing interim compensation arrangements for ISP-bound traffic would likely be wasted effort. Varner, Tr. p. 394. For the reasons set forth in more detail below, we reject BellSouth's arguments in favor of inaction.

It is apparent from our analysis thus far that the FCC envisioned and, in fact encouraged, continued state action concerning the determination of inter-carrier compensation for ISP-bound traffic. The mere fact that the FCC's *ISP Declaratory Ruling* is currently subject to a legal challenge does not in and of itself render the determinations of the FCC in that ruling void. To be sure, the determinations made by the FCC in the *ISP Declaratory Ruling* represent controlling federal law on the issue until such time as a court of competent jurisdiction determines otherwise. The Commission, therefore, has a duty and responsibility to exercise the authority it currently has, at least until such time as a federal rule is implemented.

One of the major factors which dictates immediate action on the issue of inter-carrier compensation for ISP-bound traffic is the fact that the FCC has indicated that any federal rule governing that issue which is ultimately promulgated in the future, will have prospective application only. It accordingly appears that if the Commission does not take action to require compensation for calls to ISPs, ICG will never be compensated for the calls it delivers to ISPs during the interim period between the approval of an interconnection agreement between ICG and BellSouth and the time the FCC adopts a federal rule governing that subject. Schonhaut, Tr. p. 311. This problem will only be exacerbated if the FCC does not act quickly to implement a federal inter-carrier compensation rule governing ISP-bound traffic. As noted by ICG witness Schonhaut, it took the FCC almost 2 years (20 months) to respond to the June, 1997 request for clarification that led to the issuance of its *ISP Declaratory Ruling* in February of 1999. *Id.*

In light of the concerns set forth immediately above, we do not find merit in BellSouth's fall-back proposition that the parties simply track ISP-bound traffic until such time as the FCC promulgates its federal rule and apply any compensation mechanism adopted by the FCC retroactively. As discussed in more detail below, it is undeniable that ICG will incur costs in terminating traffic to its ISP customers which originates from BellSouth customers. It would be entirely inconsistent with the competitive principles underlying the Act not to provide ICG with some mechanism to recover those costs as they are incurred. The immediate need for such a mechanism is only heightened given the delay which may well transpire before a federal rule is finally promulgated by the FCC for prospective application. The Commission's failure to implement such a mechanism in the interconnection agreement between ICG and BellSouth at this juncture would likely preclude ICG from competing for ISP customers and ultimately from competing for other types of customers as well. Starkey, Tr. pp. 53-54.

Having arrived at the conclusion that the Commission has the jurisdiction to establish inter-carrier compensation for ISP-bound traffic (including reciprocal compensation) and that said jurisdiction should be exercised in this arbitration proceeding, the question now becomes what type of inter-carrier compensation is most appropriate for ISP-bound traffic. Our analysis of that inquiry turns or further consideration of the FCC's *ISP Declaratory Ruing* and the concept of cost recovery. More particularly, our analysis centers on a determination of the costs ICG incurs in terminating traffic that is originated on BellSouth's network and terminates to ISP end user customers of ICG, as well as the recovery of those costs.

ICG asserts that the costs it incurs in delivering a call bound for an ISP customer do not differ from those generated by calls bound for other types of ICG customers. In fact, ICG argues that ISP-bound calls are functionally identical to local voice calls which are subject to reciprocal compensation. According to ICG witness, Starkey, a "ten minute call originated on the BellSouth network and directed to the ICG network travels exactly the same path, requires the use of exactly the same facilities and generates exactly the same level of costs regardless of whether that call is dialed to an ICG local residential customer or to an ISP provider. Tr. p. 56. ICG asserts that it is, therefore, irrelevant that once the call reaches the ISP it continues on to its ultimate destination of an Internet web site.

While ICG incurs no costs for the component of the call not on its network, it is the portion of the call that is carried on ICG's facilities that is relevant. According to ICG, that segment of the call is identical to any local call in terms of how ICG's network is used. ICG, therefore, asserts that there is no basis for treating ISP-bound calls differently than calls to any other local exchange customer when the costs to deliver the calls made to the residential customer and the ISP customer are identical. ICG asserts that if the Commission does not require reciprocal compensation for ISP-bound calls, ICG will not receive any compensation for calls to ISPs and will be unable to recover its costs of delivering calls to ISP customers on behalf of end users served by BellSouth. Schonhaut, Tr. p. 307.

ICG further argues that reciprocal compensation for ISP-bound traffic is economically efficient and should be required in this arbitration. More particularly, ICG asserts that reciprocal compensation is cost based and imposes the costs of delivering traffic on the cost causer--the carrier whose subscriber initiates the call. ICG, therefore, maintains that in an efficiently functioning market, BellSouth should be economically indifferent as to whether it incurs the cost to deliver an ISP-bound call on its own network or whether it incurs that cost through a reciprocal compensation rate paid to ICG.

In support of its economic indifference theory, ICG argues that calls which originate on the BellSouth network and are delivered to a BellSouth-served ISP, and calls that are originate on the BellSouth network and terminate to ICG-served ISPs travel very similar paths. According to ICG, the only difference will be that when the ISP is an ICG customer, ICG performs the switching function to deliver the call to the ISP. In such a scenario, BellSouth avoids the switching costs and ICG incurs them. ICG asserts that if BellSouth has accurately established its terminating reciprocal compensation rate based on its own costs of delivering the call, BellSouth should be economically indifferent to whether a call that originates on its network is delivered to a BellSouth customer or to an ICG customer. In the first instance, BellSouth will incur the cost of delivering the call via its own switch. In the second, BellSouth will incur that cost via a cost-based rate paid to ICG for delivering the call. Starkey, Tr. pp. 59-60.

In addition to the legal arguments previously discussed, BellSouth counters the ICG arguments in favor of reciprocal compensation as an appropriate inter-carrier compensation mechanism with a strained claim that the Commission should not require reciprocal compensation for ISP-bound traffic because such traffic is interstate "access" traffic for which reciprocal compensation does not apply. Varner, Tr. p. 401.

The premise of BellSouth's "access" traffic argument is that ISP-bound traffic should be treated as "access" traffic for which the revenues generated must be shared between the local exchange carriers involved in originating and terminating the traffic. Under BellSouth's proposal, the LEC serving-and therefore billing-the ISP would treat the ISP's payments for business services purchased out of the serving carriers local exchange tariff as "access" revenue and share it with the other carrier. Varner, Tr. pp. 421-422.

In evaluating the appropriateness of requiring reciprocal compensation as the appropriate inter-carrier compensation mechanism for ISP-bound traffic in this proceeding, we find BellSouth "access" traffic arguments to be misplaced and totally contrary to prevailing regulatory mandates. The FCC has repeatedly emphasized that it has since 1983 treated ISP-bound traffic as though it were local and continues to do so. The FCC's *ISP Declaratory Ruling* is in fact replete with references to this continued practice:

> "Although the Commission has recognized that enhanced service providers (ESPs), including ISPs, use interstate access services, since 1983 it has exempted ESPs from the payment of certain interstate access charges. Pursuant to this exemption, ESPs are treated as end users for purposes of assessing access charges, and the Commission permits ESPs to purchase their links to the public switched telephone network (PSTN) through intrastate business tariffs rather than through interstate access tariffs. Thus, ESPs generally pay local business rates and interstate subscriber line charges for their switched access connections to the local exchange company's central offices. In addition, incumbent LEC expenses and revenues associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes. ESPs also pay the special access surcharge when purchasing special access lines under the same conditions as those applicable to end users. In the A*ccess Charge Reform Order* the Commission decided to maintain the existing price and structure pursuant to which ESPs are treated as end users for the purpose of applying access charges. Thus the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local." *Id.* at & 5.
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> "As explained above, under the ESP exemption LECs may not impose access charges on ISPs; therefore, there are no access revenues for interconnecting carriers to share. Moreover the Commission has directed states to treat ISP traffic as if it were local by permitting ISPs to purchase their PSTN links through local business tariffs." *Id.* at & 9.

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> "Our determination that at least a substantial portion of dial-up ISP-bound traffic is interstate does not, however, alter the current ESP exemption. ESPs, including ISPs, continue to be entitled to purchase their PSTN links through intrastate (local) tariffs rather than through interstate access tariffs." *Id.* at & 20.

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> "The Commission's treatment of ESP traffic dates from 1983 when the Commission first adopted a different access regime for ESPs. Since then, the Commission has maintained the ESP exemption pursuant to which it treats ESPs as end users under the access charge regime and permits them to purchase their links to the PSTN through intrastate local business tariffs rather than through interstate access tariffs. As such, the Commission discharged its interstate regulatory obligations through the application of local business tariffs. Thus, although recognizing that it was interstate access, the Commission has treated ISP-bound traffic as though it were local. In addition, incumbent LECs have characterized expenses and revenues associated with ISP-bound traffic as intrastate for separations purposes." *Id.* at & 23.

It is abundantly clear from the above references that ISPs purchase monthly local exchange service much like any other local exchange customer. As local exchange customers, ISPs do not pay access charges and neither ICG nor BellSouth can force ISPs to pay switched access charges for access to their networks. Thus, there are no access revenues for interconnecting carriers to share. Clearly, ISP-bound traffic is not subject to an access charge regulatory framework but rather is treated as local exchange traffic for regulatory purposes.

Having rejected BellSouth's "access" traffic arguments, we find merit in ICG's arguments regarding the similarities between local exchange traffic and ISP-bound traffic. In fact, we are persuaded that calls over local exchange carrier (LEC) facilities to ISPs appear functionally equivalent to local voice calls which are subject to reciprocal compensation. Since the same network facilities and functions are utilized to complete both types of calls, it is axiomatic that the costs to deliver them are identical. We find that those identical costs dictate that the rates associated with recovering those costs should also be identical. We accordingly find that reciprocal compensation should apply to ISP-bound traffic just as it does to local voice traffic.

We are also persuaded that reciprocal compensation is economically efficient because it is cost based and imposes the cost of delivering traffic on the carrier whose subscriber causes the cost by initiating the call. We further believe that reciprocal compensation based on the elemental rates of transport, end office, and tandem switching adopted on August 25, 1998 in our *UNE Pricing Docket* and equaling $.00351 per minute is the most reasonable and appropriate interim inter-carrier compensation mechanism we can require. The adoption of such a rate ensures that BellSouth will incur the same costs as it would if the calls in question were delivered to a BellSouth-served ISP.

We further believe that adopting a TELRIC-based compensation mechanism is more likely to be consistent with the federal rule which will ultimately be adopted by the FCC. Such a mechanism certainly appears to be consistent with the FCC's traditional treatment of ISP-bound traffic and ISPs generally. It further appears that such an interim mechanism is consistent with the provisions of the FCC's *ISP Declaratory Ruling* as set forth above. Perhaps most importantly, however, the interim inter-carrier compensation mechanism required herein appears to be the most reasonable means of ensuring that ISP-bound traffic does not become a class of traffic for which there is no mechanism of cost recovery.

The Conclusion of the Arbitration Panel as to Issue No. 1

Based on the foregoing discussion, the Arbitration Panel concluded that, pending the adoption of a federal rule by the FCC, dial-up calls to ISPs should be subject to reciprocal compensation. The Panel further found that the reciprocal compensation rate for such traffic should be based on the elemental rates of transport, end office and tandem switching adopted in the Commission's *UNE Pricing Docket* and equaling $.00351 per minute. The Arbitration Panel specifically rejected the BellSouth position that the parties track ISP traffic pending the establishment of a federal rule and retroactively apply any mechanism ultimately adopted by the FCC to such traffic.

The Findings and Conclusions of the Commission as to Issue No. 1

We concur with the Arbitration Panel's conclusion that pending the adoption of a federal rule by the FCC, dial-up calls to ISPs should be subject to reciprocal compensation. We further concur with the reasoning relied upon by the Arbitration Panel in reaching that recommendation. It is, however, the belief of the Commission that the public interest would be best served by requiring that the interim inter-carrier compensation required herein be subject to retroactive "true-up" once the FCC issues its final federal rule governing inter-carrier compensation for ISP-bound calls and said rule becomes effective. More specifically, we adopt the recommendation of the Advisory Division that the compensation herein ordered for ISP-bound traffic be retroactively "trued-up" to the level of inter-carrier compensation ultimately adopted by the FCC.

In order to prepare for the eventuality of a "true-up" of the interim inter-carrier compensation ordered herein for ISP-bound traffic, we hereby instruct the parties to track all ISP-bound calls and their duration effective immediately upon the approval and implementation of the interconnection agreement which will result from this Arbitration. Once the FCC issues its anticipated federal rule governing inter-carrier compensation for ISP-bound traffic and said rule becomes effective, that rule will prospectively govern the compensation to be paid by the parties to this proceeding for ISP-bound traffic. Similarly, the compensation ordered to be paid in this proceeding for ISP-bound traffic will be retroactively "trued-up" to the FCC mechanism from the effective date of the interconnection agreement that results from this Arbitration. If through that retroactive "true-up" process any funds are found to be owing by one party to the other, the party owing such funds shall submit them to the opposite party within thirty (30) days of the completion of the "true-up" process.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 2: FOR PURPOSES OF RECIPROCAL COMPENSATION SHOULD ICG BE COMPENSATED FOR END OFFICE, TANDEM AND TRANSPORT ELEMENTS OF TERMINATION WHERE ICG's SWITCH SERVES A GEOGRAPHIC AREA

COMPARABLE TO THE AREA SERVED BY BELLSOUTH's TANDEM SWITCH (PETITION ISSUE 7).

The ICG Position

According to ICG, FCC Rule 51.711 requires that where the interconnecting carrier's switch serves a geographic area comparable to that served by the incumbent local exchange carrier ("ILEC"), the appropriate rate for the interconnecting carrier's additional cost is the incumbent's tandem interconnection rate. To be eligible for this rate, the FCC requires only that the interconnecting carrier's switch serve the same geographical area as the incumbent's switch. ICG asserts that the record indicates that this is the case for ICG's switch in Alabama. Starkey, Tr. pp. 72, 102 Moreover, ICG maintains that its switch performs the same functionality as the BellSouth tandem switch. In fact, ICG contends that its Lucent 5ESS switching platform meets the definition and performs the same functions identified in the Local Exchange Routing Guide ("LERG") for a tandem office and for a Class 4/5 switch.

The BellSouth Position

BellSouth's position regarding this issue is that if a call is not handled by a switch on tandem basis, it is not appropriate to pay reciprocal compensation for the tandem switching function. BellSouth accordingly maintains that it will pay the tandem interconnection rate if ICG's switch is identified in the LERG as a tandem. Varner, Tr. p. 413.

A tandem switch connects trunks and is an intermediate connection between an originating telephone call location and the final destination of the call. If ICG's switch is an end office switch, it is handling calls that originate or terminate to customers served by that local switch and is not a tandem switch. According to BellSouth, ICG is thus seeking compensation for equipment it does not own and functionality it does not provide.

BellSouth also asserts that the evidence in the record does not support ICG's position that it provides the transport elements. BellSouth maintains that the Act does not contemplate that the compensation for transporting and terminating local traffic should be symmetrical when one party does not actually provide the network facility for which it seeks compensation. BellSouth accordingly urges the Commission to deny ICG's request for tandem switching compensation when tandem switching is not performed.

The Arbitration Panel's Discussion of Issue No. 2

The FCC's Rule 51.711 expressly states that where the interconnecting carrier's switch serves a geographic area comparable to that served by the ILEC's tandem switch, the appropriate interconnection rate for the interconnecting carrier is the tandem interconnection rate. We find nothing in the record to controvert ICG's claim that its switch is geographically comparable to BellSouth's tandem switch. BellSouth does not in fact argue the issue of geographic comparability, but instead argues distinctions in functional equivalency which are not requirements of the aforementioned FCC Rule. Varner, Tr. pp. 413-415. Even if FCC Rule 51.711 is read to include functional equivalency requirements as BellSouth seems to suggest, we find that ICG has demonstrated the requisite functional equivalency by introducing evidence that its Lucent 5ESS switch meets the definition of a tandem switch in the Local Exchange Routing Guide. Starkey, Tr. pp. 105-108.

The Conclusion of the Arbitration Panel as to Issue No. 2

Based on the foregoing discussion, the Arbitration Panel concluded that ICG's switch serves an area geographically comparable to that served by BellSouth's tandem switch and provides functionality comparable to that provided by BellSouth's tandem switch. The Arbitration Panel therefore concluded that ICG is entitled to reciprocal compensation at the tandem interconnection rate which is comprised of (1) tandem switching; (2) transport between the BellSouth tandem and its end office switches and (3) end office switching. The established TELRIC-based rates for these elements equals $.00351 per minute pursuant to the Commission's *UNE Pricing Docket.*

The Findings and Conclusions of the Commission as to Issue No. 2

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 3: SHOULD BELLSOUTH BE REQUIRED TO COMMIT TO PROVISIONING THE REQUISITE NETWORK BUILDOUT AND NECESSARY SUPPORT WHEN ICG AGREES TO ENTER INTO A BINDING FORECAST OF ITS TRAFFIC REQUIREMENTS IN A SPECIFIED PERIOD (PETITION ISSUE 11).

The ICG Position

ICG points out that it relies on BellSouth end office trunks to deliver traffic to ICG's switch. These trunks are usually BellSouth's responsibility to provision and administer. ICG provides BellSouth with quarterly traffic forecasts to assist BellSouth in planning for facilities to handle traffic between their networks. BellSouth is under no obligation to add more end office trunks even though ICG's forecasts may indicate that additional trunking is necessary. Jenkins, Tr. pp. 235-236. ICG wants the option of requiring BellSouth to provision additional end office trunks dictated by ICG's forecast. In exchange, ICG will agree to pay BellSouth for any trunks which are not fully utilized as indicated by the forecast. i.e., a take or pay agreement.

ICG maintains that under its proposal, BellSouth will not assume any risk for additional trunks that are underutilized. ICG in fact asserts that it will assume all of the risk. If this provision is ordered by the Arbitration Panel, ICG expects to use it sparingly.

ICG asserts that BellSouth has agreed to a binding forecast mechanism on at least two prior occasions in Alabama. ICG further maintains that BellSouth's revised Statement of Generally Available Terms and Conditions ("SGAT") filed with the Commission in September 1998 contains a binding forecast provision which largely mirrors the arrangement ICG requests. Also, in the interconnection agreement between BellSouth and KMC Telecom II, BellSouth agreed to a binding forecast provision similar to that requested by ICG.

The BellSouth Position

BellSouth asserts that although it is continuing to analyze the possibility of providing binding forecasts and has not foreclosed the idea, BellSouth can not be ordered to agree to binding forecasts because there is no requirement that it do so pursuant to 47 U.S.C. §251. Varner, Tr. p. 416. BellSouth accordingly argues that pursuant to 47 U.S.C. §252(c), binding forecasts are not properly subject to arbitration. According to BellSouth, the binding forecast provision of BellSouth's September 1998 SGAT provides that neither party is required to enter into a binding forecast.

The Arbitration Panel's Discussion of Issue No. 3

The threshold question regarding this issue is whether the Commission has jurisdiction to require a binding forecast provision in a 47 U.S.C. §252 arbitration as requested by ICG. BellSouth is correct in pointing out that there is not a specific provision of 47 U.S.C. §251 which requires ILECs to enter binding forecasts. The relevant inquiry, however, is not whether there is any direct reference to binding forecast in 47 U.S.C. §251, but whether requiring binding forecasts is consistent with the general interconnection obligations of ILECs as set forth in that section of the Act. As noted below, we believe the answer to that inquiry is yes.

Pursuant to 47 U.S.C. §251(c)(2)(C), incumbent LECs are required to provide interconnection with requesting carriers that is at least equal in quality to that provided by the local exchange carrier to itself. ICG's binding forecast proposal clearly relates to interconnection and is designed to ensure that such interconnection is provided to ICG on a non-discriminatory basis. ICG's proposal, therefore, falls well within the parameters of 47 U.S.C. §251 and the Commission's authority pursuant to that section.

We note that BellSouth normally has the financial responsibility for the facilities which ICG seeks to make subject to binding forecasts. Under the proposal put forth by ICG, however, ICG will be required to pick up all or part of the cost for those facilities by either (1) paying BellSouth one-twelfth of the tariffed price for the forecasted plant, as a binding forecast fee, if the binding forecast trunks are used; or (2) paying BellSouth one-hundred-percent of the tariffed price for the forecasted plant if the trunks are not used. Jenkins, Tr. pp. 234-236. Clearly, ICG's proposal protects BellSouth from assuming unreasonable or unnecessary risk. We accordingly find that ICG's proposal is a just and reasonable basis for the parties to negotiate the details of a binding forecast arrangement.

The Conclusion of the Arbitration Panel as to Issue No. 3

Based on the foregoing, the Arbitration Panel concluded that it, and therefore the Commission, had jurisdiction under the provisions of 47 U.S.C. §§251 and 252 to require BellSouth to include a binding forecast provision in its interconnection agreement with ICG. The Arbitration Panel accordingly found that BellSouth should be required to include in its interconnection agreement with ICG a provision which requires the parties to negotiate in good faith the specific terms and conditions of binding forecasts.

The Findings and Conclusions of the Commission as to Issue No. 3

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 4: SHOULD BELLSOUTH BE REQUIRED TO PROVIDE THE "ENHANCED EXTENDED LINK" (EEL) AS A UNE COMBINATION (PETITION ISSUE 4).

The ICG Position

ICG asserts that the provisioning of EELs as UNEs at the DS-0 and DS-1 level will act to extend the range of ICG's ability to serve customers, thus permitting ICG to bring the benefits of competition to a much broader base of Alabama businesses and customers than ICG is currently able to serve. ICG asserts that the FCC's Rule 51.315(b) makes clear that if BellSouth currently combines loop and transport, BellSouth must make loop and transport available as a UNE combination at UNE prices.

ICG asserts that the FCC's September 15, 1999 *News Release*, issued in FCC Docket 99-238, makes clear that the Commission has the authority to require BellSouth to combine the loop and transport UNEs comprising the EEL under 47 U.S.C. §251. Even to the extent that the EEL is not an existing combination within BellSouth's network, ICG asserts that the Commission should require BellSouth to make the EEL available to ICG and other competitors. ICG maintains that the Commission has the authority under 47 U.S.C. §251 (c)(3) of the Act to order such UNE combinations. ICG urges the Commission to use its authority to require BellSouth to provide EELs. ICG maintains that the EEL is an efficient mechanism for bringing the benefits of competition to Alabama because it will allow ICG and other CLECs to serve customers without having to be collocated in a particular customer's serving central office.

ICG also argues that the EEL should be offered at the TELRIC-based UNE prices established by the Commission. According to ICG, the total price charged by BellSouth for the EEL should be the sum of (1) the TELRIC rate for an unbundled loop; (2) the TELRIC rate for a cross-connect of appropriate capacity; and (3) the TELRIC rate for unbundled interoffice dedicated transport. BellSouth should not be permitted to impose any charge for combining the individual elements.

ICG contends that the Commission has already awarded the EEL to ITC^DeltaCom Communications, Inc. in its interconnection agreement with BellSouth. ICG requires the same service in order to compete.

The BellSouth Position

BellSouth argues that the EEL is nothing more than a combination of three separate UNE's which replicates private line and/or special access services. Varner, Tr. p. 393. BellSouth further argues that at the time of the August 11, 1999 hearing, there was no FCC rule requiring BellSouth to provide such a UNE combination and that BellSouth should not, therefore, be ordered to provide such a combination of UNEs in this proceeding. Varner, Tr. p. 376.

Absent an FCC order, however, BellSouth will, on a voluntary basis, provide EELs through "Professional Services Agreements." BellSouth asserts that since those offers are separate and apart from any obligations under 47 U.S.C. §§251 and 252, there is no requirement that the EEL be provided at TELRIC rates. Therefore, the EEL is offered at prices approximating retail.

The Arbitration Panel's Discussion of Issue No. 4

The combination of UNEs has been one of the more contentious issues arising from the passage of the Act and the rules originally promulgated by the FCC to implement the requirements of the Act. The rules governing UNE combinations originally promulgated by the FCC in its *Local Competition Order* have their genesis in 47 U.S.C. §251(c)(3) which imposes on incumbent LECs:

> "[T]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this Section and §252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

Pursuant to the above provisions, the FCC adopted its Rule 51.315(b) which prohibits incumbent LECs from separating UNEs combined in their networks. The FCC also adopted its Rule 51.315(c)–(f) which requires incumbent LECs to combine previously uncombined elements.

The FCC reasoned that the only way to give meaning to the requirement that incumbent LECs "shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements" was to interpret it as compelling the incumbent LECs to do the combining for the benefit of the requesting carriers. The FCC rejected the concept of requiring the requesting carrier to do the combining itself as impossible because it found that "new entrants lacked the facilities and information about the incumbent's network necessary" to do the combining. The FCC, therefore, reasoned that "we do not believe it is possible that Congress, having created the opportunity to enter the local telephone markets through the use of unbundled elements, intended to undermine that opportunity by imposing technical obligations on requesting carriers that they might not be able to readily meet."

FCC Rules 51.315(b) and 51.315(c)-(f) were subsequently vacated by the United States Court of Appeals for the Eighth Circuit which found that 47 U.S.C. §251(c)(3) could not be read to levy a duty on incumbent LECs to do the actual combining of elements. The Eighth Circuit's decision regarding FCC Rule 51.315(b) was, however, reversed by the United States Supreme Court. In reversing the Eighth Circuit, the Supreme Court held that the FCC's interpretation of §251(c)(3) was "entirely rational, finding its basis in §251(c)(3)'s nondiscrimination requirement." According to the Supreme Court, Rule 51.315(b) was designed to prevent incumbent LECs from imposing "wasteful costs" on requesting carriers and that it was "well within the bounds of the reasonable for the [FCC] to opt in favor of ensuring against an anti-competitive practice."

Although the Supreme Court's ruling clearly validated FCC Rule 51.315(b) and the Eighth Circuit subsequently reinstated that Rule, there remained some uncertainty regarding the impact of the rule due to the Supreme Court's decision to vacate the FCC's Rule 51.319 on the grounds that the FCC had not adequately considered the "necessary" and "impair" standards of 47 U.S.C. §251(d)(2) in establishing its Rule 319 list of UNEs. FCC Rule 51.319 establishes the network elements that must be provided on an unbundled basis and, therefore, cannot be "uncombined" pursuant to Rule 51.315(b) if they are already combined in the ILEC's network.

In its *News Release* issued on September 15, 1999, the FCC summarized a yet to be released order addressing the reestablishment of the Rule 319 list of UNEs. The FCC specifically noted therein that "[p]ursuant to §51.315(b) of the Commission's Rules, incumbent LECs are required to provide access to combinations of loop, multiplexing/concentrating equipment and dedicated transport" – the components of the EEL- if they are currently combined."

Based on the foregoing, the Commission can and should require BellSouth to provision the EEL at the DS-O and DS-1 levels where it currently combines those loops with transport within its network. Reinstated FCC Rule 51.315(b) mandates such a result given the FCC's specific statements concerning the EEL in its efforts to reinstate the Rule 51.319 list of UNEs. Such a result is entirely consistent with controlling law and the principles of efficient competition.

Even though the FCC's Rule 51.315(c)-(f) requiring ILECs to combine previously uncombined elements remains vacated at present, we nonetheless find that BellSouth must, for a reasonable cost-based fee, combine the UNEs comprising the EEL for ICG in situations where those elements currently are not combined in the BellSouth network. We find support for this proposition not only from the Supreme Court's discussion of the FCC's reasoning which undergirded the reinstatement of FCC Rule 51.315(b) in *AT&T Corp.*, but also from the Act generally at 47 U.S.C. §252.

In reinstating FCC Rule 51.315(b), the Supreme Court placed great emphasis on the FCC's reliance on 47 U.S.C. §251(c)(3) and the FCC's pro-competitive logic in general. Had FCC Rule 51.315(c)-(f) been before the Supreme Court in *AT&T Corp.*, we are quite sure that the Supreme Court's logic in reinstating FCC Rule 51.315(b) would have clearly dictated reinstatement of Rule 51.315(c)-(f). Such a result would be logical because the same nondiscrimination requirement that undergirds Rule 51.315(b)'s requirement that combined elements not be separated also underlies the requirement that the incumbent LECs must combine elements for requesting carriers which is codified in FCC Rule 51.315 (c)-(f). Thus, in light of the Supreme Court's decision in *AT&T Corp.*, there is ample authority for the proposition that under 47 U.S.C. §251(c)(3), incumbent LECs can be required to combine UNEs for requesting carriers.

Regardless of the current status of FCC Rule 51.315(c)-(f), the Commission has independent authority pursuant to 47 U.S.C. §252 to order EEL combinations on its own. More particularly, 47 U.S.C. §252(c)(1) states that "[i]n resolving by arbitration … any open issues and imposing conditions on the parties to the agreement, a state commission shall … ensure that such resolution and conditions meet the requirements of §251, including the regulations prescribed by the [FCC] pursuant to §251." It is important to note that while the FCC's implementing regulations are included among the factors that state commissions must consider in implementing

47 U.S.C. §251, the Act plainly contemplates that the state's authority under 47 U.S.C. §251 is not restricted to applying the FCC's rules. To the contrary, states are free to act as they see fit to give substance to 47 U.S.C. §251 so long as they are not in conflict with the FCC's rules.

We arrived at the conclusion that the EEL must be provided to ICG by BellSouth even in situations where the elements comprising the EEL are not currently combined in the BellSouth network only after carefully undertaking the "necessary" and "impair" analysis embraced by the Supreme Court in *AT&T Corp.* Among other things, we considered the alternative methods and/or facilities available to ICG for the provisioning of the functions that could be achieved by the EEL in circumstances where the network elements comprising the EEL are not presently combined in the BellSouth network. As part of that analysis, we assessed whether in those circumstances ICG has alternative methods of providing the functionality achieved by the EEL without the imposition of undue financial burden or a degradation of service.

From the foregoing analysis, we determined that the EEL is the only efficient mechanism currently available to ICG for bringing the benefits of competition to Alabama businesses and consumers because it will allow ICG to serve customers without having to be collocated in the BellSouth Central Office serving that particular customer. Widespread availability of the EEL will thus enable ICG to serve, and bring the benefits of competition, to a much broader base of Alabama end users than it is currently able to. The EEL is necessary to provide service, particularly in less dense residential areas where collocation is not feasible. In such instances, the unavailability of the EEL would certainly "impair" ICG's ability to provide service because there is no other source for this access.

Further, if the EEL is made available only in circumstances where the UNEs comprising it are already combined in the BellSouth network, ICG will be forced to incur the unnecessary and duplicative costs associated with collocating in the BellSouth Central Offices where ICG has customers and BellSouth does not currently combine the elements comprising the EEL. Such a scenario is cost prohibitive and requires ICG to unnecessarily duplicate the public switched telephone network through widespread collocation. Holdridge, Tr. p 277 We find such a result unacceptable and counterproductive to the development of competition in this state. We accordingly hold that BellSouth must make the EEL available to ICG even in situations where the elements comprising the EEL are not currently combined in the BellSouth network.

The Conclusion of the Arbitration Panel as to Issue No. 4

Based on the foregoing discussion, the Arbitration Panel found BellSouth's arguments that the EEL should be provided outside the context of the Act and at prices approximating retail services meritless. The Arbitration Panel majority further found that the EEL must be made available to ICG by BellSouth regardless of whether the elements comprising the EEL are currently combined in the BellSouth network. In all cases, the Arbitration Panel found that EEL should be provided by BellSouth at the TELRIC-based UNE prices established by the Commission in the *UNE Pricing Docket*, and at the DS-O and DS-1 levels. Specifically, the Arbitration Panel concluded that the total price charged by BellSouth for the EEL should be precisely the sum of the Commission established TELRIC rates for: (1) an unbundled loop; (2) a cross-connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

The Arbitration Panel noted that BellSouth should not be permitted to impose any charge for combining the individual elements set forth above where they are already combined in the BellSouth network. However, the Arbitration Panel concluded that BellSouth should be entitled to the impose a reasonable, cost-based fee for combining the elements which comprise the EEL in situations where those elements are not currently combined in the BellSouth network. The Arbitration Panel recommended that the parties be required to submit cost studies establishing such a fee such as soon as possible, but no later than sixty (60) days following the Order of the Commission adopting the Arbitration Panel's recommendation in that regard. The Arbitration Panel noted that the Commission should act expeditiously on the establishment of such a combination fee or "glue charge." Until the establishment of such a fee by the Commission or an agreement among the parties concerning such a fee, the Arbitration Panel held that BellSouth should not be required to combine the elements comprising the EEL where those elements are not currently combined in the BellSouth network.

The Findings and Conclusions of the Commission as to Issue No. 4

We fully concur with the findings and conclusions of the Arbitration Panel with regard to the provision of the EEL by BellSouth when the elements comprising the EEL are already combined in BellSouth's network. The FCC's long-awaited order regarding UNEs was released on November 5, 1999. As anticipated, the FCC's *UNE Order* prohibits incumbent LECs such as BellSouth from separating loop and transport elements where they are currently combined. We accordingly hold that based on the FCC's *UNE Order* and the reasoning relied on by the Arbitration Panel, BellSouth must provide the EEL to ICG in situations where the elements comprising the EEL are currently combined in the BellSouth network.

The provision of the EEL by BellSouth in situations where it is currently combined in the BellSouth network shall be in accordance with the parameters established by the FCC in its November 5, 1999 *UNE Order*. Further, the EEL shall be provided at the TELRIC-based UNE prices established by the Commission in the *UNE Pricing Docket* and at the DS-0 and DS-1 levels. Specifically, the total price charged by BellSouth for the EEL shall be precisely the sum of the Commission-established TELRIC rates for: (1) an unbundled loop; (2) a cross connect of appropriate capacity; and (3) unbundled interoffice dedicated transport.

With regard to the provision of the EEL in circumstances where the elements comprising it are not already combined in the BellSouth network, the Commission majority, consisting of Commission President Sullivan and Commissioner Cook, does not concur with the findings and conclusions of the Arbitration Panel. To the contrary, the Commission majority adopts the recommendation of the Advisory Division and finds that it would be unwise to require an incumbent LEC such as BellSouth to combine network elements that are not currently combined in its network since that issue is still pending before the Eighth Circuit. BellSouth is not, therefore, required to provide the combination of loop, multiplexing/concentrating equipment, and dedicated transport where those elements are not currently combined in the BellSouth network. However, in the event that the Eighth Circuit subsequently determines that incumbent LECs must indeed combine UNEs, including the loop, multiplexing/concentrating equipment, and dedicated transport where they are not currently combined in the incumbent LEC's network, the Commission majority finds that BellSouth must, from the effective date of such a requirement, combine UNEs for ICG in a manner consistent with any such requirement so implemented.

It should be noted that Commissioner Wallace dissented from the Commission majority and voted to accept the Arbitration Panel majority's recommendation that BellSouth be required to combine the elements comprising the EEL even in instances where those elements are not currently combined in the BellSouth network. Commissioner Wallace does, however, concur with the notion that BellSouth must be required to provide the EEL where it is not currently combined in the BellSouth network in the event that the Eighth Circuit subsequently determines that ILECs such as BellSouth must do so.

IT IS SO ORDERED BY THE COMMISSION.

ISSUE NO. 5: SHOULD VOLUME AND TERM DISCOUNTS BE AVAILABLE FOR UNEs (PETITION ISSUE NO. 6).

The ICG Position

ICG asserts that when it commits to purchase a large volume of UNE's, BellSouth benefits because it is able to use its facilities more efficiently, and its costs per UNE go down. ICG represents that when BellSouth refuses to pass on any of those benefits to ICG, not only does ICG not gain the benefits of economy that is has generated for BellSouth through its volume purchases, it faces a more efficient BellSouth in the marketplace wherein BellSouth can offer lower prices to its retail customers. Starkey, Tr. p. 120.

ICG further contends that when ICG and BellSouth agree to provision UNEs over long terms, BellSouth benefits through little or no volatility of demand, and therefore, experiences little or no risk. According to ICG the result is that BellSouth can more efficiently utilize its resources and decrease the likelihood of stranded investment. *Id.*

ICG asserts that BellSouth should pass the above described saving and/or economies on to ICG. ICG contends that it is within the authority of the Commission to require BellSouth to do so.

The BellSouth Position

BellSouth argues that neither the Act nor any FCC order or rule requires volume and term discount pricing for UNEs. Varner, Tr. p. 412. BellSouth also maintains that the UNE recurring rates that ICG will pay are cost-based in accordance with the requirements of §252(d) and are derived using least-cost, forward looking technology consistent with the FCC's rules. Furthermore, BellSouth argues that its non-recurring rates already reflect any economies involved when multiple UNEs are ordered and provisioned at the same time. *Id.*

BellSouth additionally contends that the TELRIC-based prices for UNEs set by the Commission already incorporate the savings inherent in volume and term purchases because they are calculated on future plant utilization and network costs, not current utilization and network costs. BellSouth also asserts that its obligations to provide statewide average loop prices precludes its ability to pass through savings associated with volume purchases in a particular locality. BellSouth maintains that the basis upon which ICG seeks volume and term discounts would require the Commission to rethink the pricing methodology adopted in its *UNE Pricing Docket*. According to BellSouth, the cost methodology employed by the Commission in that proceeding is compliant with the provisions of the Act and the rules of the FCC. BellSouth, therefore, concludes that there is no reason to reconsider the cost methodology employed by the Commission in that proceeding.

The Arbitration Panel's Discussion of Issue No. 5

We conclude that the Commission clearly has jurisdiction to require volume and term discounts for UNEs pursuant to 47 U.S.C. §252. In particular, 47 U.S.C. §252(d)(1) dictates that prices for UNEs shall be established on the basis of cost and in a non-discriminatory manner.

While we concur with the basic premise of ICG's argument that UNE prices must reflect cost savings attributable to UNE volume and term purchases, we note that there are various methods of achieving this result. The Panel finds that the method which will most benefit overall competition in Alabama is to consider any cost savings from increased UNE purchase volumes in establishing overall UNE rates. This is the method that would most ensure that smaller CLECs are not disadvantaged.

We note at this juncture that the Commission previously determined UNE prices generically in its *UNE Pricing Docket*. We, therefore, conclude that arguments concerning cost savings from increased UNE purchase volumes and extended term commitments must be addressed generically in the context of that previously established Docket. We, therefore, recommend that ICG petition the Commission for reconsideration of the previous findings entered in the *UNE Pricing Docket* if it feels that the existing UNE prices do not generically incorporate cost savings resulting from increased UNE purchase volumes and term commitments.

The Conclusion of the Arbitration Panel as to Issue No. 5

Based on the foregoing, the Arbitration Panel concluded that any cost savings resulting from increased UNE purchase volumes and extended term commitments must be addressed generically in the context of the Commission's *UNE Pricing Docket*. The Arbitration Panel, therefore, recommend that ICG Petition the Commission for reconsideration of the previous findings entered in the *UNE Pricing Docket* if it feels that the UNE prices established therein do not generically incorporate cost savings resulting from increased UNE purchase volumes and term commitments.

The Findings and Conclusions of the Commission as to Issue No. 5

The Commission concurs with the findings and conclusions of the Arbitration Panel concerning this issue. We accordingly adopt the findings and conclusions of the Arbitration Panel in that regard as our own.

IT IS SO ORDERED BY THE COMMISSION.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be efective as of the date hereof.
DONE at Montgomery, Alabama this 10th day of November, 1999.

ALABAMA PUBLIC SERVICE COMMISSION
Jim Sullivan, President
Jan Cook, Commissioner
George C. Wallace, Jr., Commissioner

ATTEST: A True Copy
Walter L. Thomas, Jr., Secretary

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Rebuttal Testimony of James C. Falvey

Exhibit 5

US WEST COMMUNICATIONS, INC., Plaintiff,
v.
MINNESOTA PUBLIC UTILITIES COMMISSION, Edward A. Garvey, Chairman, Joel Jacobs, Commissioner, Marshall Johnson, Commissioner, Gregory Scott, Commissioner, and Don Storm, Commissioner (In Their Official Capacities as Past or Present Commissioners of the Minnesota Public Utilities Commission); and AT & T Wireless Services, Inc., Defendants.

No. CIV. 98-914 ADMAJB.

United States District Court, D. Minnesota.

March 30, 1999.

Incumbent local exchange carrier (ILEC) requested judicial review of interconnection agreement provision approved by Minnesota Public Utility Commission. The District Court, Montgomery, J., held that: (1) finding that ILEC should compensate calls terminated at wireless company's mobile switching center at tandem switch rate, rather than end-office switch rate, was not arbitrary or capricious; (2) ILEC could be required to construct, at wireless company's request and expense, new facilities needed to provide interconnection at any technically feasible point within ILEC's network; (3) Commission lacked authority to regulate telephone directory publisher; (4) ILEC could be required to make its recording and billing services available to wireless company to facilitate company's collection of termination charges when third party originated calls that transited ILEC's network and were then terminated on company's network; and (5) ILEC's taking claim was not yet ripe for adjudication.

Request granted in part and denied in part.

[1] TELECOMMUNICATIONS k267

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State commissions arbitrating disputes between incumbent local exchange carriers (ILEC) and competing local exchange carriers (CLEC) over interconnection agreements are limited to arbitrating open issues raised by parties themselves.

Telecommunications Act of 1996, 47 U.S.C.A. § 252(c).

[2] TELECOMMUNICATIONS k461.5
372k461.5
Minnesota Public Utility Commission's finding that incumbent local exchange carrier (ILEC) should compensate calls terminated at wireless company's mobile switching center at tandem switch rate, rather than end-office switch rate, was not arbitrary or capricious; center performed functions comparable to both types of landline switches and covered area comparable to tandem switch. Telecommunications Act of 1996, 47 U.S.C.A. § 252(d)(2)(A).

[3] STATUTES k212.6
361k212.6
Presumptively, identical words used in different parts of same act are intended to have same meaning.

[4] TELECOMMUNICATIONS k267
372k267
"Necessary" equipment for interconnection, for which incumbent local exchange carrier (ILEC) has statutory duty to provide physical collocation, is more narrowly defined than equipment which is merely "useful" for interconnection. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(6).

[5] TELECOMMUNICATIONS k461.5
372k461.5
Minnesota Public Utility Commission had authority to require incumbent local exchange carrier (ILEC) to construct, at wireless company's request and expense, new facilities needed to provide interconnection at any technically feasible point within ILEC's network. Telecommunications Act of 1996, 47 U.S.C.A. § 251(c)(2)(B).

[6] TELECOMMUNICATIONS k269
372k269
Minnesota Public Utility Commission's state law authority to regulate public utility telephone companies did not extend to affiliated company which published telephone directories. M.S.A. § 237.23.

[7] TELECOMMUNICATIONS k267
372k267
Company which published telephone directories was not covered entity under Telecommunications Act. Telecommunications Act of 1996, 47 U.S.C.A. §§ 153(26), 251(b)(3).

[8] TELECOMMUNICATIONS k267
372k267
Minnesota Public Utility Commission lacked authority to require telephone directory publisher to treat incumbent local exchange carrier (ILEC) and its competitors the same with respect to yellow page

advertising and white page directory listings.

[9] TELECOMMUNICATIONS k461.5
372k461.5
Minnesota Public Utility Commission had authority to resolve, in arbitration proceeding, any open issues parties were unable to resolve in negotiations for interconnection agreement, so long as resolution did not violate or conflict with Telecommunications Act. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251, 252(b)(4)(C), (c).

[10] TELECOMMUNICATIONS k461.5
372k461.5
Minnesota Public Utility Commission had authority to require incumbent local exchange carrier (ILEC) to make its recording and billing services available to wireless company to facilitate company's collection of termination charges when third party originated calls that transited ILEC's network and were then terminated on company's network; even though issue was not covered in Telecommunications Act, it was open issue between parties, was expressly presented to Commission for resolution, and Commission's resolution did not violate or conflict with Act. Telecommunications Act of 1996, 47 U.S.C.A. §§ 251, 252(b)(4)(C), (c).

[11] ADMINISTRATIVE LAW AND PROCEDURE k462
15Ak462
When Congress establishes burden of proof or production to be applied in administrative proceedings, courts must defer to Congress; however, when Congress is silent as to issue, it is left to judiciary to resolve question.

[12] TELECOMMUNICATIONS k461.5
372k461.5
Minnesota Public Utility Commission, when arbitrating open issues from interconnection agreement negotiations between incumbent local exchange carrier (ILEC) and wireless company, properly placed burden of production and persuasion with respect to all issues of material fact upon ILEC, except to extent that company had control of critical information regarding issue in dispute.

[13] EMINENT DOMAIN k286
148k286
Federal district court, reviewing Public Utility Commission's resolution of open issues from interconnection agreement negotiations between incumbent local exchange carrier (ILEC) and wireless company, had jurisdiction to hear ILEC's claim that physical collocation requirement imposed by Commission was unconstitutional taking

without just compensation. U.S.C.A. Const.Amend. 5; Telecommunications Act of 1996, 47 U.S.C.A. § 252(e)(6).

[14] EMINENT DOMAIN k277
148k277
In order for takings claim to be ripe: (1) administrative agency must have reached final, definitive position as to how it will apply regulation at issue, and (2) plaintiff must have attempted to obtain just compensation through procedures provided by State. U.S.C.A. Const.Amend. 5.

[15] EMINENT DOMAIN k70
148k70
Takings Clause is not meant to limit government's ability to interfere with individual's property rights, but rather to ensure compensation when legitimate interference that amounts to taking occurs. U.S.C.A. Const.Amend. 5.

[16] EMINENT DOMAIN k74
148k74
Compensation does not have to precede taking in order to satisfy Takings Clause; Clause is satisfied so long as process for obtaining compensation exists at time of taking. U.S.C.A. Const.Amend. 5.

[17] EMINENT DOMAIN k2(1.1)
148k2(1.1)
In determining whether interconnection agreement between incumbent local exchange carrier (ILEC) and competing local exchange carrier (CLEC) constitutes taking of ILEC's property without just compensation, issue is whether any provision or provisions of agreement negatively affect overall operation of the ILEC to such degree that it can no longer receive fair rate of return from its investment. U.S.C.A. Const.Amend. 5.

[18] EMINENT DOMAIN k277
148k277
Incumbent local exchange carrier's (ILEC) claim that interconnection agreement with competing local exchange carrier (CLEC) constituted taking of ILEC's property without just compensation was not ripe for judicial review because ILEC had not yet exhausted state law opportunities to have its rates adjusted. U.S.C.A. Const.Amend. 5.

***970** Geoffrey P. Jarpe and Martha J. Keon, Maun & Simon, PLC; Kevin J. Saville, U.S. West Communications, Inc.; and Wendy M. Moser, Norton Cutler, and Blair A. Rosenthal, U.S. West, Inc., for Plaintiff U.S. West Communications, Inc.

Dennis D. Ahlers and Megan J. Hertzler, Assistant Attorneys General, for Defendants MPUC and the Commissioners.

Mark J. Ayotte and Darrin M. Rosha, Briggs and Morgan, P.A., for Defendant AT & T Wireless Services, Inc.

MEMORANDUM OPINION AND ORDER

MONTGOMERY, District Judge.

Plaintiff U.S. West Communications, Inc., ("US West") brought this action pursuant to the Telecommunications Act of 1996 ("the Telecommunications Act" or "the Act"), specifically 47 U.S.C. § 252(e)(6), seeking judicial review of determinations made by the Minnesota Public Utilities Commission ("MPUC"). US West has named the individual commissioners of the MPUC as Defendants. For purposes of this order, the individual commissioners and the MPUC, itself, will be referred to collectively as the MPUC.

The above-captioned case is one of eight cases involving review of determinations made by the MPUC presently before this Court. On December 10, 1997, this Court issued an Order in US WEST Communications, Inc. v. Garvey, No. 97-913 ADM/AJB, slip op. at 3 (D.Minn. Dec. 10, 1997), determining the scope of review for cases brought pursuant to § 252(e)(6). The Court found the scope of review limited to an appellate review of the record established before the MPUC. Id. On May 1, 1998, the Court filed an Order addressing the standard of review in the eight Telecommunications Act cases. AT & T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998). Questions of law will be subject to de novo review while questions of fact and mixed questions of fact and law will be subject to the arbitrary and capricious standard. Id. at 11-13.

***971** I. BACKGROUND

Before 1996, local telephone companies, such as U.S. West, enjoyed a regulated monopoly in the provision of local telephone services to business and residential customers within their designated service areas. AT&T Communications of Southern States v. BellSouth Telecomms., Inc., 7 F.Supp.2d 661, 663 (E.D.N.C.1998). In exchange for legislative approval of this scheme, the local monopolies ensured universal telephone service. Id. During this monopolistic period, the local telephone companies constructed extensive telephone networks in their service areas. Id.

Congress passed the Telecommunications Act of 1996, in part, to end the monopoly of local telephone markets and to foster competition in those markets. Iowa Utilities Bd. v. FCC, 120 F.3d 753, 791 (1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999); GTE North, Inc. v. McCarty, 978 F.Supp. 827, 831 (citing Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 104-458, at 113 (1996)). Because the local monopolies, or incumbent local exchange carriers ("ILECs" or "incumbent LECs"), had become so entrenched over time through their construction of extensive facilities, Congress opted "not to simply issue a proclamation opening the markets," but rather constructed a detailed regulatory scheme to enable new competitors to enter the local telephone market on a more equal footing. AT & T Communications of the Southern States, 7 F.Supp.2d at 663. The Act obligates the incumbent LECs, like U.S. West: (1) to permit a new entrant in the local market to interconnect with the incumbent LEC's existing local network and thereby use the LEC's own network to compete against it (interconnection); (2) to provide competing carriers with access to individual elements of the incumbent LEC's own network on an unbundled basis (unbundled access); and (3) to sell any telecommunication service to competing carriers at a wholesale rate so that the competing carriers can resell the service (resale). Iowa Utils. Bd., 120 F.3d at 791 (citing 47 U.S.C.A. § 251(c)(2)-(4)). In order to facilitate agreements between incumbent LECs and competing carriers, the Act creates a framework for both negotiation and arbitration. 47 U.S.C. § 252. Two sections of the Act, 47 U.S.C. §§ 251 and 252, explain the basic structure of the overall scheme for opening up the local markets.

Section 251

Section 251 describes the three relevant classes of participants effected by the Act: (1) telecommunications carriers, (2) local exchange carriers, and (3) incumbent local exchange carriers. 47 U.S.C. § 251(a), (b), and (c). A telecommunications carrier is a provider of telecommunications services, 47 U.S.C. § 153(44), telecommunication services being "the offering of telecommunications for a fee directly to the public ...," 47 U.S.C. § 153(46), and telecommunications being "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Both U.S. West and Defendant AT & T Wireless Services, Inc., ("AWS") qualify as telecommunications carriers. A local exchange carrier ("LEC") is "any person that is engaged in the provision of telephone exchange service or exchange access," 47 U.S.C. § 153(26), within an exchange area. 47 U.S.C. § 153(47). An incumbent local exchange carrier is a company that was an existent local exchange carrier on February 8, 1996, and was deemed to be a member of the exchange carrier association. 47 U.S.C. § 252(h). In this action, only U.S. West qualifies as an incumbent LEC.

Section 251 establishes the duties and obligations of these categories of participants. For example, all telecommunications carriers have a duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications *972 carriers," 47 U.S.C. § 251(a); local exchange carriers have a duty "not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." 47 U.S.C. § 251(b); and incumbent LECs have a duty to negotiate in good faith with telecommunications carriers seeking to enter the local service market, as well as a duty to "offer for resale at wholesale prices any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. § 251(c). Section 251 requires an incumbent LEC to provide interconnection that is at least equal in quality to that provided by the incumbent LEC to itself at any technically feasible point, 47 U.S.C. § 251(c)(2); to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, 47 U.S.C. § 251(c)(3); and to provide for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier. 47 U.S.C. § 251(c)(6).

Section 252

Section 252 delineates the procedures for the negotiation, arbitration, and approval of an interconnection agreement that permits a new carrier's entry into the local telephone market. 47 U.S.C. § 252. Once an incumbent LEC receives a request for an interconnection agreement from a new carrier, the parties can negotiate and enter into a voluntary binding agreement without regard to the majority of the standards set forth in § 251 of the Act. 47 U.S.C. § 252(a). If the parties cannot reach an agreement by means of negotiation, after a set number of days, a party can petition a State commission, here the MPUC, to arbitrate unresolved open issues. 47 U.S.C. § 252(b)(1).

An interconnection agreement adopted by either negotiation or arbitration must be submitted for approval to the State commission. 47 U.S.C. § 252(e)(1). The State commission must act within 90 days after the submission of an agreement reached by negotiation or after 30 days of an agreement reached by arbitration. 47 U.S.C. § 252(e)(4). The State commission must approve or reject the agreement, with written findings as to any deficiencies. 47 U.S.C. § 252(e)(1).

FCC Regulations

47 U.S.C. § 251(d)(1) directs the FCC to promulgate regulations implementing the Act's local competition provisions within six months of February 8, 1996. "Unless and until an FCC regulation is stayed or overturned by a court of competent jurisdiction, the FCC regulations have the force of law and are binding upon state PUCs [Public Utility Commissions] and federal district courts." AT&T Communications of California v. Pacific Bell, 1998 WL 246652, at *2 (N.D.Cal. May 11, 1998) (citing Anderson Bros. Ford. v. Valencia, 452 U.S. 205, 219-20, 101 S.Ct. 2266, 68 L.Ed.2d 783 (1981)). Review of FCC rulings is committed solely to the jurisdiction of the United States Court of Appeals pursuant to 28 U.S.C. § 2342(1) and 47 U.S.C. § 402(a).

On August 8, 1996, the FCC issued its First Report and Order, which contains the Agency's findings and rules pertaining to the local competition provisions of the Act. Iowa Utils., Bd., 120 F.3d at 792 (citing First Report and Order, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 F.C.C.R. 15499, CC Docket No. 96- 98 (Aug. 8, 1996) ("First Report and Order")). Soon after the release of the First Report and Order, incumbent LECs and State Commissions across the country filed motions to stay the implementation of the Order, in whole or in part. The cases were consolidated in front of the Eighth Circuit. In Iowa Utilities Board, the

Eighth Circuit decided that "the FCC exceeded its jurisdiction in promulgating the pricing rules regarding local telephone service." Id. The Eighth Circuit ***973** also vacated the FCC's "pick and choose" rule as being incompatible with the Act. Id. at 801. Other provisions of the First Report and Order were upheld by the Eighth Circuit.

On August 8, 1996, the FCC also promulgated the Second Report and Order, which contains additional FCC comments and regulations concerning provisions of the Telecommunications Act of 1996 that were not addressed in the First Report and Order. The People of the State of California v. FCC, 124 F.3d 934, 939 (8th Cir.1997), rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). Again many local exchange carriers and state commissions filed suit challenging the order. Several cases were combined in front of the Eighth Circuit, which issued another order addressing the FCC's rules. Id.

On January 25, 1999, the Supreme Court reversed a significant portion of the Eighth Circuit's decisions. AT & T Corp. v. Iowa Utils. Bd., 119 S.Ct. at 721. The Supreme Court ruled that the FCC does have jurisdiction to implement local pricing rules and the FCC's rules governing unbundled access, with the exception of Rule 319, are consistent with the Act. Id. at 738. In addition, the Supreme Court upheld the FCC's "pick and choose" rule as a reasonable, and possibly the most reasonable, interpretation of § 252(i) of the Act. Id.

Procedural History

In this case, AWS, a Commercial Mobile Radio Service ("CMRS"), sent a letter dated October 3, 1996, to U.S. West making a request for the partes to negotiate an Interconnection Agreement pursuant to the Act. (A1, Ex. 1). The parties failed to reach accord on all issues and AWS petitioned the MPUC for arbitration on March 7, 1997.(A1). In its Petition for Arbitration, AWS noted eleven open issues for arbitration. (A1; Petition for Arbitration at 7-23). On April 1, 1997, U.S. West submitted its response to the MPUC. (A7).

On April 17, 1997, the MPUC granted AWS's petition and established procedures for the arbitration. (A11; MPUC Order Granting Petition at 1-5). The MPUC referred the matter to the Office of

Administrative Hearings [FN1] to designate an Administrative Law Judge (ALJ) to conduct the arbitration proceedings and issue a recommendation. (A11; MPUC Order Granting Petition at 4). In its order, the MPUC noted that the Minnesota Department of Public Service ("DPS") [FN2] and the Residential Utilities Division of the Office of the Attorney General ("RUD-OAG") [FN3] had a right under state law to intervene in all MPUC proceedings. (A11; MPUC Order Granting Petition at 6).

FN1. The Office of Administrative Hearings is an independent state agency which employs administrative law judges to conduct impartial hearings on behalf of other state agencies. Minn.Stat. §§ 14.48 and 14.50.

FN2. The Minnesota Department of Public Service is a state agency charged with the responsibility of investigating utilities and enforcing state law governing regulated utilities, as well as enforcing the orders of the MPUC. The DPS is authorized to intervene as a party in all proceedings before the MPUC. Minn.Stat. § 216A.07.

FN3. The Attorney General of Minnesota is "responsible for representing and furthering the interests of residential and small business utility consumers through participation in matters before the Public Utilities Commission involving utility rates and adequacy of utility services to residential or small business utility consumers." Minn.Stat. § 8.33, subd. 2.

The MPUC ordered that: "The burden of production and persuasion with respect to all issues of material fact shall be on U.S. WEST. The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute." (A11; MPUC Order Granting Petition at 10). The MPUC reasoned that the federal Telecommunications Act and the Minnesota Telecommunications Act of 1995 ***974** are designed to create competitive entry into the local telephone market and placing the burden of proof on U.S. West facilitates this purpose. (A11; MPUC Order Granting Petition at 10). The MPUC further explained that U.S. West controlled most of the key information relevant to the proceedings. (A11; MPUC Order Granting Petition at 10).

On May 2, 1997, AWS and U.S. West submitted a matrix of twelve key issues to ALJ Allen Giles and the MPUC. (A15). Those issues included:

1) Access to Service Agreements;
2) Points of Interconnection;
3) Pricing of Services;
4) Application of Access Charges;
5) Reciprocal Compensation/Symmetrical Compensation;
6) Access to Unbundled Network Elements;
7) Items Specific to Paging;
8) Access to Poles, Ducts, Conduits, and Rights of Way;
9) Reciprocal Compensation Effective Date and Rates;
10) Contract Language;
11) Service Quality Standards; and
12) Transit Traffic.

(A15; Positions on Key Issues at 1-7). US West withdrew from its original list of open issues Wide Area Inbound Calling; Access to Numbering Resources; Dialing Parity; and Procedure for Notice of Change, because those issues were no longer in dispute. (A15; Positions on Key Issues at 5).

ALJ Giles presided over the arbitration hearing on May 6 and 7, 1997. (A17-A19). Attorneys for U.S. West, AWS, and the DPS were present, as well as a member of the MPUC staff. (A17; ALJ Hearing Transcript at 2). Eight witnesses were called and various exhibits were entered. (A17-A19). AWS called Kerri M. Landeis, Director of External Affairs for AWS, (A20); Russell Thompson, Director of Network Planning for AWS, (A22); and Dr. Thomas M. Zepp, economist and Vice-President of Utility Resources, Inc., (A25), as expert witnesses. (A17-A18). US West called Thomas G. Londgren, Director of the Minnesota Regulatory Group for U.S. West, (A28); Denyce Jennings, U.S. West's Manager of Wireless Interconnection, (A30); Craig Wiseman, a member of U.S. West's technical staff in the Interconnection Planning Group, (A18; ALJ Hearing at 261); and Dean Buhler, a member of U.S. West's technical staff in Information Technologies, (A18; ALJ Hearing at 312), as expert witnesses. (A17-A19). US West also submitted the rebuttal testimony of Robert Harris, Principal at the Law and Economics Consulting Group and Professor Emeritus of Business and Public Policy in the Haas School of Business, University of California, Berkeley. (A39). The DPS called Susan Peirce, Public Utilities Rates Analyst for the MPUC, as an expert witness. (A40, Ex. A). The parties, including the DPS, submitted post-hearing briefs. (A45-A50). On June 6, 1997, the ALJ issued a Report and Recommended Arbitration Decision. (A51).

In early June, both U.S. West and AWS filed exceptions to the Recommended Arbitration Decision. (A53); (A54). By letter dated June 11, 1997, the DPS noted no exceptions would be filed as the ALJ's recommendations were consistent with the positions advocated by the DPS. (A55). The MPUC heard a staff briefing and oral arguments on June 30 and July 2, 1997.(A57). Pursuant to its vote at the July 2 meeting, the MPUC issued its Order Resolving Arbitration Issues on July 30, 1998.(A58). In its Order, the MPUC took judicial notice of the stayed FCC rules and made the FCC methodologies part of the record. (A58; Order Resolving Arbitration Issues at 2). The MPUC ruled on the following issues:

1) Bill & Keep;
2) Interim Prices;
3) Compensation to AWS from Third-Party Carriers;
***975** 4) Compensation for Traffic Terminated at AWS' Mobile Switching Center (MSC);
5) Access Charges for Intra-Major Trading Area (MTA) Roaming Calls;
6) Compensation for Terminating Paging Calls;
7) Dedicated Paging Facilities;
8) The Effective Date for Reciprocal Compensation;
9) Rates to Be Applied Between Commencement of Reciprocal Compensation and the Issuance of an Order;
10) "Pick and Choose" Option;
11) Points of Interconnection;
12) Limitation on Distance as to Mid-span Meet Point;
13) Collocation of AWS' Remote Switching Units (RSUs) and Digital Loop Carrier Systems (DLCs) at U.S. West's Premises;
14) The Definition of "Collocated Premises";
15) Denial of Access Due to Space Exhaustion;
16) Nondiscriminatory Access to Unbundled Network Elements;
17) Access to Operational Support Systems (OSS);
18) Remedies for Service Quality Violations;
19) Access to Poles, Ducts, Conduits, and Rights of Way;
20) Adoption of Proposed Contract as Template; and
21) Arbitration Costs.

(A58; Order Resolving Arbitration Issues at 4-33). The MPUC ordered the parties to submit a final contract, containing all the arbitrated and negotiated terms, no later that 30 days from the service date of the MPUC's Order. (A58; Order Resolving Arbitration Issues at 34). On August 27, 1997, the parties submitted a CMRS Interconnection Agreement in accordance with the Order, but expressly reserved all rights in connection with any future challenges to the Order. (A48; Letter of Mark Ayotte at 2). The parties were unable to resolve the issue of special construction for interconnection facilities and therefore submitted two alternative versions for the portion of the Agreement addressing that issue. (A48; Letter of Mark Ayotte at 2).

On August 11, 1997, AWS filed a Petition for Reconsideration. (A59). On September 18, 1997, the Petition for Reconsideration and the Proposed Contract came before the MPUC. (A66; Order Resolving Issues After Reconsideration at 1). On September 29, 1997, the MPUC issued its Order Resolving Issues After Reconsideration, Examining Interconnection Agreement, and Requiring Compliance Filing. (A66). In that Order, the MPUC granted in part and denied in part AWS' Petitions for Reconsideration; the MPUC was persuaded that the compensation rate for AWS-terminated traffic should be the tandem switching rate rather than calculated on a per call basis. (A66; Order Resolving Issues After Reconsideration at 3, 11). The MPUC also corrected an error in its calculation of prices. (A66; Order Resolving Issues After Reconsideration at 4). The MPUC adopted the language submitted by AWS concerning special construction for interconnection facilities as the final contract language. (A66; Order Resolving Issues After Reconsideration at 11). The MPUC required a few further amendments and modifications to the Agreement, such as the addition of a notice provision and a provision concerning U.S. West Dex. (A66; Order Resolving Issues After Reconsideration at 6-11). The MPUC found the rest of the agreement to be generally consistent with the federal Act, Minnesota law, and the public interest. (A66; Order Resolving Issues After Reconsideration at 6).

The MPUC ordered the parties to submit a final contract that complied with its Order within 30 days; the MPUC noted ***976** that a final contract with the proposed modifications would meet all applicable legal requirements, and therefore would be approved and effective as of September 18, 1997. (A66; Order Resolving Issues After Reconsideration at 11). The final U.S. West-AWS Agreement was filed with the MPUC on October 30, 1997.(A68). On December 15 and March 4, 1998, the MPUC issued two memorandums noting that the parties filed an Agreement that complied with its Order of September 29, 1997.(A69); (A73).

On March 13, 1998, pursuant to 47 U.S.C. § 252(e)(6), U.S. West filed the instant action seeking review of the MPUC's Orders. US West alleges nine counts in its complaint: (1) Count I, the MPUC violated U.S. West's due process rights and the dictates of the Act and Minnesota law by placing the burden of proof on U.S. West; (2) Count II, the MPUC violated 47 U.S.C. §§ 252(b)(1) and (b)(4)(A) by considering issues not included in AWS' petition or U.S. West's response; (3) Count III, the MPUC violated 47 U.S.C. § 252(d)(2) and (d)(A)(ii) by treating AWS's Mobile Switching Center ("MSC") as a tandem switch for the purpose of compensation; (4) Count IV, the MPUC violated 47 U.S.C. § 251(c)(6) when it required U.S. West to collocate RSUs and DLCs on its premises; (5) Count V, the MPUC violated 47 U.S.C. § 252(i) by ordering the inclusion of a provision in the Interconnection Agreement referencing the "unsettled state of the law" concerning the "pick and choose" rule; (6) Count VI, the MPUC violated § 251(c)(2) when it ordered U.S. West to provide interconnection at any technically feasible point, even if construction is involved; (7) Count VII, the MPUC exceeded its authority when it imposed conditions on U.S. West Dex; (8) Count VIII, the MPUC exceeded its authority under § 252(b)(4)(C) and (c) of the Act when it imposed requirements not expressly contained in the Act or state law; and (9) Count IX, the MPUC violated the Takings Clause by taking U.S. West's property without just compensation.

II. OPERATIONAL SUPPORT SYSTEMS AS AN OPEN ISSUE

US West argues that the MPUC improperly required U.S. West to provide AWS access to its operational support systems ("OSS"). US West alleges the MPUC had no authority to require this access because this was not an open issue before the MPUC.

[1] Section 252(c) ("Standards for arbitration") states that:

> In resolving by arbitration under subsection (b) of this section any open issues and

> imposing conditions upon the parties to the agreement, a State commission shall-
> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 U.S.C. § 252(c) (emphasis added). Standing alone, this provision could arguably be read as ambiguous concerning the MPUC's ability to impose any condition of its choosing. However, when read in conjunction with 47 U.S.C. § 252(b) ("Agreements arrived at through compulsory arbitration"), there is a clear indication that any condition that the MPUC decides to impose on the agreement must relate to an "open issue," that is an issue raised by the parties themselves. Section 252(b)(4)(A) states that "[t]he State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any ...." This subsection indicates that the MPUC cannot independently ***977** raise an issue not raised by one of the parties. This interpretation is further reinforced by subsection (b)(4)(C) which states that "[t]he State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement ...." In this context, the imposition of conditions is expressly limited to resolving open issues. Therefore, § 252(c) cannot be read as a grant of authority to a state commission to impose any requirement of its choosing; under § 252(c) state commissions are limited to arbitrating open issues.

The MPUC and AWS argue, in turn, that the issue of access to unbundled network elements was clearly before the MPUC as an open issue and that because the OSS is a network element to be made available to new entrants on an unbundled basis according to 47 C.F.R. § 15.319, the issue of access to the OSS was also clearly before the MPUC.

After the MPUC issued its order and the parties submitted their briefs in this case, the Supreme Court vacated § 15.319. AT&T Corp., 525 U.S. at ----, 119 S.Ct. at 736. The Supreme Court stated that the FCC, in determining which network elements an incumbent LEC must make available, should give greater weight to the terms "necessary" and "impair" in § 252(d)(2). Id. The issue of access to OSS was an open issue only to the extent it could be considered a network element to be made available on an unbundled basis. In light of the Supreme Court's decision vacating 47 C.F.R. § 15.319, whether OSS can be considered an unbundled network element is now in doubt and § 15.319 cannot serve as the basis for its being considered such. Because the singular basis asserted by the MPUC for its considering access to OSS an open issue has now been removed by the Supreme Court, this Court concludes that the MPUC lacked authority under § 252(c) to require U.S. West to make access to its OSS available to AWS. This issue is remanded to the MPUC for further consideration in light of this Order. [FN4]

FN4. As was noted by the Eastern District of North Carolina, the Act does not explain what should occur if a district court finds that an Interconnection Agreement violates the Act. AT & T Communications of the Southern States, Inc. v. BellSouth Telecommunications, Inc., 7 F.Supp.2d 661, 668 (E.D.N.C.1998). Given the appellate nature of the proceeding, a remand to the state commission is the most appropriate option. Id.

III. TANDEM TRANSPORT AND TERMINATION

US West argues that a provision of the Agreement imposed by the MPUC unlawfully compensates calls terminated at AWS's MSC at the tandem switching rate. US West alleges that the MPUC failed to consider actual function, that is that the MSC actually operates like an end-office switch rather than a tandem switch, in making its determination.

Section 251(b)(5) of the Act directs that all local exchange carriers are obligated to establish reciprocal compensation arrangements for the transport and termination of telecommunications. 47 U.S.C. § 251(b)(5). The terms and conditions for reciprocal compensation must be just and reasonable and, to meet this standard, they must allow for the recovery of a reasonable approximation of the "additional cost" of transporting and terminating a call begun on another carrier's network. 47 U.S.C. § 252(d)(2)(A). The FCC found that the "additional cost" will vary depending on whether or not a tandem switch is involved. First Report and Order, ¶ 1090. The FCC, therefore, determined that state commissions can establish transport and termination rates that vary depending on whether the traffic is routed through a tandem switch or directly to a carrier's end-office switch. Id. The FCC directed state commissions to "consider whether new technologies (e.g. fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's ***978** tandem switch and thus, whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." Id. The FCC further instructed that where the new carrier's switch serves a geographic area comparable to that served by the incumbent LEC's tandem switch, the appropriate proxy for the new carrier's costs is the LEC tandem interconnection rate. First Report and Order, ¶ 1090; 47 C.F.R. § 51.711(a)(3). [FN5] Therefore, in order to evaluate whether a switch performs as a tandem switch, it is appropriate to look at both the function and geographic scope of the switch at issue.

FN5. The Eighth Circuit vacated 47 C.F.R. § 51.711(a)(3) on the ground that the FCC lacked jurisdiction to issue pricing rules. Iowa Utils. Bd., 120 F.3d at 800, 819 n. 39. However, the Supreme Court reversed this determination and reinstated the FCC's pricing rules, including 47 C.F.R. § 51.711, finding that "the Commission has jurisdiction to design a pricing methodology." AT&T Corp., 119 S.Ct. at 733.

Whether a switch performs as a tandem or end-office switch is a factual determination that has been expressly delegated to the state commissions by the FCC. Because this is a question of fact, the MPUC's determination is reviewed using the arbitrary and capricious standard of review. AT & T Communications of the Midwest, Inc. v. Contel of Minnesota, No. 97-901 ADM/JGL, slip op. at 10-11 (D.Minn. April 30, 1998) (order denying motions to dismiss and determining standard of review); see TCG Milwaukee, Inc. v. Public

Service Commission of Wisconsin, 980 F.Supp. 992, 1004 (W.D.Wis.1997).

The fundamental technical differences between wireless and landline telephone systems greatly complicate the comparison of the functions of their component elements. It is to some extent like comparing the proverbial apples and oranges.

Russell Thompson, Director of Network Planning for the Western Region of AWS, testified that the MSC performs duties similar to both a tandem and an end-office switch. (A23; Rebuttal Testimony of Russell Thompson at 1). Thompson described landline networks as being characterized by hierarchical switching centers with both tandem and end-office switches often being involved in the routing of calls. (A23; Rebuttal Testimony of Russell Thompson at 2). Wireless networks were explained as being hierarchical involving IS 41 Tandems, Cell Site Control ("CSC") switches, and cell sites in the routing of calls. (A23; Rebuttal Testimony of Russell Thompson at 2). The IS 41 and CSC are both located in the MSC. (A23; Rebuttal Testimony of Russell Thompson at 2). The CSC switches and cell sites together perform end office-like functions, (A23; Rebuttal Testimony of Russell Thompson at 7-8), while the IS 41 Tandem provides tandem-switch functions. (A23; Rebuttal Testimony of Russell Thompson at 3). "[T]andem switching systems perform trunk switching and generally provide two basic network functions--traffic concentration and centralization of services." (A23; Rebuttal Testimony of Russell Thompson at 9 (citing BOC Notes on Network, Section 4, Network Design and Configuration, 4.1.3.3, Tandem Switching Systems, pp. 4-6)). Thompson testified that the IS 41 Tandem performs both these functions. (A23; Rebuttal Testimony of Russell Thompson at 9).

Thomas Zepp, economist and Vice President of Utility Resources, Inc., confirmed Thompson's assessment that the MSC functions as a tandem switch. (A25; Direct Testimony of Thomas Zepp at 38-41). Zepp gave a number of examples as to how a MSC performs tandem functions, for example storing the location of and tracking a wireless customer in a "Home Location Register," routing calls to another MSC while a customer is in transit, and routing phone calls to a landline in the most cost-effective manner. (A25; Direct

Testimony of Thomas Zepp at 38-40).

US West, in turn, presented strong evidence that the MSC functions as an end- *979 office switch rather than a tandem switch. (A42; Direct Testimony of Craig Wiseman at 9). US West's expert Craig Wiseman, a member of U.S. West's technical staff in the Interconnection Planning Group, testified that the MSC only connected AWS subscribers to each other or to other local service provider networks in order to deliver calls to or receive calls from AWS subscribers. (A42; Direct Testimony of Craig Wiseman at 9). AWS depends on U.S. West tandems to send calls to or receive calls from the vast majority of subscribers in Minnesota and the rest of the United States. (A42; Direct Testimony of Craig Wiseman at 9). Wiseman also testified that other wireless companies, such as GTE Mobilenet, SouthWestco, and Aliant, had recognized their switching offices as end offices in arbitrated agreements, and that other state arbitration panels had determined that wireless companies are not entitled to tandem switching and transport compensation. (A42; Directory of Craig Wiseman at 13).

On the issue of the geographic scope of the switches, there was evidence that the MSC serves a geographic area similar to that of a landline tandem switch. US West's tandem switches are limited by the LATA [FN6] boundaries in Minnesota and therefore there are several tandem switches within the state. (A18; ALJ Hearing at 209-10). AWS' MSC directly serves sixty-six percent of Minnesota's population. (A17; ALJ Hearing at 33). Although percentage of population is not precise as to geographic area covered, it indicates that the MSC covers at least an area comparable to one of Minnesota's LATAs and therefore covers an area comparable to a U.S. West tandem switch. US West argues that AWS' MSC fails to reach the same geographic area as all of U.S. West's tandem switches. (A42; Direct Testimony of Craig Wiseman at 11- 12). However, that comparison is irrelevant. The issue is not whether the MSC covers the same geographic area as all of the tandem switches in Minnesota, but rather whether it covers the same geographic area as one tandem switch.

FN6. A Local Access and Transport Area ("LATA") is "a contiguous geographic area" established by a Bell operating company pursuant to a consent decree. 47 U.S.C. § 153(25). Generally a state will have more than one LATA.

[2] Based on the evidence before the ALJ and the MPUC, it appears that the MSC performs functions comparable to both end-office and tandem switches. Although there was conflicting evidence concerning the function of the MSC, the testimony of Thompson and Zepp provided a sufficient basis for the MPUC's finding that the MSC performs a tandem switch function. [FN7] This is particularly true in light of the FCC's admonition to consider the capabilities of new technology such as wireless networks. While there may be no exact corollaries between the wireless and landline systems, there is evidence to suggest that the MSC has capabilities and reach that are of a certain equivalence to a tandem switch. The evidence also indicates that the MSC covers a geographic area comparable to that covered by a tandem switch. Pursuant to the FCC rules, this alone provides sufficient grounds for a finding that the appropriate rate for the MSC is the tandem switch rate. [FN8]

FN7. US West indicated that the MPUC should have been limited by the definition of tandem switch found in 47 C.F.R. § 51.319(c)(2). However, since the MPUC made its decision, 47 C.F.R. § 51.319 was vacated by the Supreme Court. AT&T Corp., 119 S.Ct. at 736. US West's argument is now moot in light of the Supreme Court's recent decision.

FN8. The MPUC stated that it did not base its final decision on FCC Rule 51.711(a)(3) and the geographic reach of the switches, although its preliminary ruling may have taken geographic reach into consideration. (MPUC's Brief at 4). Even though the MPUC may not have relied on FCC Rule 51.711(a)(3), the reinstated rule and the comparable geographic reach of the switches reinforces the MPUC's final decision.

The MPUC's finding that calls terminated at AWS's MSC should be compensated ***980** at the tandem switching rate is not arbitrary and capricious.

IV. COLLOCATION OF EQUIPMENT

US West argues that the MPUC erred by requiring U.S. West to permit AWS to physically collocate RSUs on U.S. West's premises because such equipment is not necessary for access to unbundled network elements under § 251(c)(6). [FN9]

FN9. US West briefed only the issue of collocating RSUs, although its complaint referenced both RSUs and DLCs in connection with this issue.

Section 251(c)(6) states that an incumbent LEC has a duty to provide "for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier ...." 47 U.S.C. § 251(c)(6) (emphasis added). The FCC found that § 251(c)(6) "generally requires that incumbent LECs permit the collocation of equipment used for interconnection or access to unbundled network elements." First Report and Order, ¶ 579. In reaching that conclusion, the FCC interpreted and defined the term "necessary": "Although the term 'necessary,' read most strictly, could be interpreted to mean 'indispensable,' we conclude that for the purposes of section 251(c)(6) 'necessary' does not mean 'indispensable' but rather 'used' or 'useful.' " Id. The FCC decided that a more expansive interpretation of the term "necessary" would further the competitive motivation behind the Act. Id.

The FCC then determined whether specific equipment could or could not be collocated on the incumbent LEC's premises, essentially deciding whether the equipment is "useful" for interconnection or access to unbundled elements. Id. ¶ 580-82. Concerning the collocation of switching equipment, the FCC stated:

> At this time, we do not impose a general requirement that switching equipment be collocated since it does not appear that it is used for the actual interconnection or access to unbundled network elements. We recognize, however, that modern technology has tended to blur the line between switching equipment and multiplexing equipment, which we permit to be collocated. We expect, in situations where the functionality of a particular piece of equipment is in dispute, that state commissions will determine whether the equipment at issue is actually used for interconnection or access to unbundled elements.

Id. ¶ 581. The FCC left the factual determination as to whether "switching equipment" is used for interconnection to

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the discretion of the state commissions.

When allotting the burden of proof, the FCC placed the burden on the incumbent LEC to prove that specific equipment is not "necessary," meaning useful, for interconnection to unbundled network elements. Id. ¶ 580. In explaining this standard, the FCC stated that:

> [W]henever a telecommunication carrier seeks to collocate equipment for purposes within the scope of Section 251(c)(6), the incumbent LEC shall prove to the state commission that such equipment is not "necessary," as we have defined that term, for interconnection or access to unbundled network elements.
> Id. ¶ 580.

In addition to defining "necessary" in the context of § 251(c)(6), the FCC also interpreted the term "necessary" in relation to § 251(d)(2). [FN10] The FCC determined ***981** that within the context of § 251(d)(2) the term "necessary" means "that an element is a prerequisite for competition." First Report and Order, ¶ 282. Without a necessary element, a new entrant's "ability to compete would be significantly impaired or thwarted." Id. The FCC stated that finding that a proprietary element is not "necessary" for purposes of § 251(d)(2)(A), requires an incumbent LEC to establish that "a new entrant could offer the same proposed telecommunications service through the use of other, nonproprietary unbundled elements within the incumbent's network." Id. ¶ 283. The FCC would view the "necessary" requirement as having been met even if the " 'requesting carriers can obtain the requested proprietary element from a source other than the incumbent,' " since " ' [r]equiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act.' " AT&T Corp., 119 S.Ct. at 735 (citing First Report and Order, ¶ 283). By means of these lexicographical permutations, the FCC created a similar definition for the term "necessary" within the context of § 251(d)(2) and § 251(c)(6); in both cases, the word means something akin to "useful."

FN10. 47 U.S.C. § 251(d)(2) provides:
In determining what network elements should be made available for

> purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether-
> (A) access to such network elements as are proprietary in nature is necessary; and
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. (emphasis added).

In AT & T Corp., the Supreme Court vacated the FCC's interpretation of the word "necessary" within the context of § 251(d)(2), finding that the FCC had given the term too broad a definition and robbed it of all of its teeth as a limiting standard. AT&T Corp., 119 S.Ct. at 736. The Court stated that "the Act requires the FCC to apply some limiting standard, rationally related to the goals of the Act, which it has simply failed to do." Id.

[3][4] By rejecting the FCC's definition of the term "necessary" within the context of § 251(d)(2), the Supreme Court implicitly rejected the same overly broad definition given to the word by the FCC in relation to § 251(c)(6). "Presumptively, 'identical words used in different parts of the same act are intended to have the same meaning.' " United States National Bank of Oregon v. Independent Insurance Agents of America, 508 U.S. 439, 460, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (quoting Commissioner v. Keystone Consol. Industries, Inc., 508 U.S. 152, 159, 113 S.Ct. 2006, 124 L.Ed.2d 71 (1993)). As "necessary" does not mean "useful" in the context of § 251(d)(2), it cannot mean "useful" in § 251(c)(6). In making its factual determination about whether to permit the collocation of RSUs, the MPUC utilized the "used" or "useful" standard originally promulgated by the FCC. [FN11] In light of the rejection of this standard by the Supreme Court, collocation must be remanded to the MPUC for redetermination using a more stringent meaning of the term "necessary."

FN11. In its Order, the MPUC stated that it will allow the collocation of RSUs and DLCs on U.S. West's premises "[c]onsistent with its reasoning and action in the Consolidated Arbitration Order." (A58; Order Resolving Arbitration Issues at 22). In the Consolidated Arbitration Order, the MPUC ordered collocation of RSUs and DLCs based on U.S. West's failure "to meet its burden of proving that these types of equipment are not 'necessary,' as interpreted by the FCC, for interconnection or access to unbundled elements." (A168 from US West Communications, Inc. v. Garvey, No. 97- 913 ADM/AJB; Consolidated Arbitration Order at 16) (emphasis added).

V. "PICK AND CHOOSE" PROVISION

In its reply brief, U.S. West seeks to withdraw, without prejudice, its Count V request for declaratory relief concerning AWS's rights under § 252(i)'s most favored nation provision. (Pl.'s Reply Brief at 1 n. 1). Therefore, the Court will dismiss Count V without prejudice. It should be noted, however, that in light of the recent Supreme Court ruling, the provision concerning § 252(i) that the MPUC chose now seems prescient.

***982** VI. INTERCONNECTION AT ANY TECHNICALLY FEASIBLE POINT

The MPUC ruled that U.S. West must build facilities necessary for AWS to connect to U.S. West's network at any technically feasible point of AWS's choosing. (A66; Order Resolving Issues After Reconsideration at 7). [FN12] The MPUC approved the following language in the U.S. West-AWS Agreement: "USWS shall provide the facilities and arrangements herein described to AWS in order to establish the physical connection and permit the interchange of traffic between the Parties, as well as any other facilities AWS may require for operation of AWS's System." (A68; CMRS Interconnection Agreement at § 2.B). The MPUC also approved § 2.D of the Agreement, which would require U.S. West to build a DS1 or DS3 facility any place where one is not available. (A68; CMRS Interconnection Agreement at § 2.D).

FN12. The parties do not dispute that AWS would pay for the construction of any new facilities.

US West claims that the MPUC erred when it required U.S. West to construct new facilities. US West argues that this requirement over extends the Act's directive that incumbent LECs need to provide interconnection "that is at least equal in quality to that provided by the local exchange carrier to itself." 47 U.S.C. § 251(c)(2)(C).

The MPUC claims that § 251(c)(2)(C) is not controlling and urges that the focus should instead be on the Act's directive that incumbent LECs must provide interconnection to new entrants "at any technically feasible point within the [incumbent] carrier's network." 47 U.S.C. § 251(c)(2)(B). In support of the MPUC's ruling that U.S. West must build facilities, AWS similarly cites to § 251(c)(2)(B), as well as relying on the FCC's order stating that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements." First Report and Order, ¶ 198.

Section 251(c)(2) states that an incumbent LEC has:

> The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network-
> (A) for the transmission and routing of telephone exchange service and exchange access;
> (B) at any technically feasible point within the carrier's network;
> (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; ...

47 U.S.C. § 251(c)(2). The FCC originally interpreted § 252(c)(2)(C) as requiring incumbent LECs to provide superior quality interconnection when such interconnection was requested by new entrants. Iowa Utils. Bd., 120 F.3d at 812. The Eighth Circuit, however, vacated this FCC interpretation of § 251(c)(2)(C), finding that it was not supported by the Act's language. Id. The Eighth Circuit explained that:

> Although we strike down the Commission's rules requiring incumbent LECs to alter substantially their networks in order to provide superior quality interconnection and unbundled access, we endorse the Commission's statement that "the obligations imposed by sections 251(c)(2) and 251(c)(3) include modifications to incumbent LEC facilities to the extent necessary to accommodate interconnection or access to network elements."

Id. at 813 n. 33 (quoting First Report and Order, ¶ 198). The Eighth Circuit specifically upheld the FCC's definition of the term "technically feasible" from § 251(c)(2)(B). Id. at 810. In defining "technically feasible," the FCC stated:

> *983 Interconnection, access to unbundled network elements, collocation, and other methods of achieving interconnection or access to unbundled network elements at a point in the network shall be deemed technically feasible absent technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection, access, or methods. A determination of technical feasibility does not include consideration of economic, accounting, billing, space, or site concerns, except the space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible.
>
> 47 C.F.R. § 51.5.

In reaching its decision concerning the construction of facilities, the MPUC stated that the issue was not whether AWS can demand a superior quality interconnection, but rather whether U.S. West can be required to modify its network to permit interconnection at existing quality levels. (A66; Order Resolving Issues After Reconsideration at 7). The MPUC did not rely on the FCC's vacated interpretation of § 251(c)(2)(C), but rather what it considered to be the FCC's upheld interpretation of § 251(c)(2)(B).

The MPUC is correct that construction of a new facility does not necessarily mean superior interconnection. New facilities could be necessary just to create equivalent quality interconnection and access. Therefore, in making its ruling, the MPUC did not violate § 251(c)(2)(C).

[5] The question therefore becomes did the MPUC have the power under § 251(c)(2)(B) to order U.S. West to provide new facilities upon request or did the construction of new facilities exceed the modifications envisioned by the FCC in its interpretation of "technically feasible." The answer is dependent on whether the concept of modifying facilities is interpreted broadly or narrowly. Three factors favor a broad construction. First, the FCC stated that site concerns should not be determinative of technical feasibility except to the extent space could not be expanded. In this statement that site concerns should not

be determinative, there is an implication that the parties should look beyond any specific site, e.g. to new facilities, when resolving interconnection issues. In addition, construction of new facilities falls under the rubric of space expansion and therefore ensures technical feasibility. Second, so long as the new entrant pays for the costs associated with the new facility, the incumbent LEC should not be unduly burdened. Third, the purpose of the Act is to promote the opening up of local telephone markets to competition in a speedy manner. Because the incumbent LEC has the relevant expertise and knowledge for building facilities to interconnect with its network, it would be expedient to require it to build the facilities.

Based on the foregoing, the Court concludes that the MPUC had the necessary authority under § 251(c)(2)(B) to order U.S. West to provide new facilities on request.

VII. US WEST DEX

US West claims the MPUC exceeded its authority when it rejected the parties' agreement to defer directory and yellow page issues to later negotiations and instead required the parties to adopt a provision that regulated U.S. West Dex. U.S. West argues that the MPUC does not have the authority, under either state law or the Act, to impose obligations on U.S. West Dex.

In response, the MPUC and AWS claim that the Commission did not directly regulate U.S. West Dex. They argue that the MPUC did what it was required to do by the Act, ensure that AWS had nondiscriminatory access to telephone numbers and ***984** listings, and that U.S. West provide AWS with services that are "at least equal in quality to that provided by the incumbent LEC to itself." First Report and Order, ¶ 970.

US West Communications, Inc., the party in this case, and U.S. West Dex are wholly owned subsidiaries of U.S. West, Inc. ("US West Parent"). MCI Telecomms. Corp. v. U.S. West Communications, Inc., Case No. C97-1508R, at 23- 24 (July 21, 1998 W.D.Wash.). US West Dex is the publishing branch of the parent company and publishes U.S. West's white and yellow page directories. Id. at 24. US West Dex is not a named party to the underlying Agreement in this case.

Contrary to the MPUC's and AWS's argument, the Commission did regulate U.S. West Dex. The MPUC required the parties to include language in the Agreement that placed a direct obligation on U.S. West Dex: "US WEST Dex will give the Carrier the same opportunity to provide directory listings as it provides to U.S. WEST (for example, through some type of bidding process)." (A56; Order Denying Reconsideration at 11). While other portions of the MPUC's Order were explicitly directed only at U.S. West, the MPUC did seek to control U.S. West Dex's business and contract agreements, and therefore to regulate U.S. West Dex: "US WEST shall make its contracts with U.S. WEST DEX available for review by the Carrier, as necessary, to ensure that the Carrier is receiving the same services at the same terms as U.S. WEST." (A56; Order Denying Reconsideration at 11). The question becomes whether the MPUC had the authority to regulate U.S. West Dex under either state law or the Act, or whether it assumed authority it never had as the Plaintiff claims.

[6] Under state law, the MPUC has only the "powers expressly delegated by the legislature and those fairly implied by and incident to those expressly delegated." In the Matter of Northwestern Bell Telephone Co., 371 N.W.2d 563, 565 (Minn.Ct.App.1985) (citing Great Northern Railway Co. v. Public Service Comm'n, 284 Minn. 217, 169 N.W.2d 732, 735 (1969)). Implied powers must be fairly evident from the express powers. Id. (quoting Peoples Natural Gas Co. v. Minnesota Public Utilities Comm'n, 369 N.W.2d 530 (Minn.1985)). As the Minnesota Supreme Court held, Chapter 237 was created to resolve issues concerning public utility telephone companies; a business that publishes directories is not a telephone company and therefore does not fall under the regulatory powers of the MPUC. In the Matter of Northwestern Bell Telephone Co., 367 N.W.2d 655, 660 (Minn.App.1985). US West, as a utility, is regulated by the MPUC, while U.S. West Dex, which is in the business of publishing directories, is not. See id. The MPUC does not have the power under state law to regulate U.S. West Dex. The Court must therefore analyze federal law as the possible basis of authority for the MPUC's action regulating U.S. West Dex.

[7] The Act states that local exchange carriers have the duty to provide competitors with nondiscriminatory access to telephone numbers, directory assistance, and directory listings. 47 U.S.C. § 251(b)(3). US West Dex is not a local exchange carrier because it does not engage in providing telephone exchange

service or exchange access. See 47 U.S.C. § 153(26). As U.S. West Dex is not a covered entity under the Act, the MPUC cannot use the statute to regulate U.S. West Dex or impose an obligation on it. See MCI Telecomms, Corp. v. U.S. West Communications, Inc., Case No. C97-1508R, at 25 (July 21, 1998 W.D.Wash.). [FN13]

FN13. The FCC concluded that the term "directory listings" encompasses directory listings published by a telecommunication carrier and its "affiliates," but then never defines the term "affiliate." 47 C.F.R. § 51.5. Given the Act's express limitation of covered entities to telecommunications carriers, a telecommunications carrier's control of an entity must be a prerequisite for finding that the entity is an affiliate within the meaning of the FCC's rules. Although U.S. West and U.S. West Dex share a parent company that does not equate to exerting control over one another. Without some evidence of U.S. West's control of U.S. West Dex, the Court cannot conclude that U.S. West Dex is an affiliate of U.S. West.

***985** [8] Because it lacked the power under both state law and the Act to regulate U.S. West Dex, the MPUC exceeded its authority by ordering the addition of a provision to § 11 requiring U.S. West Dex to treat U.S. West and its competitors the same with respect to yellow page advertising and white page directory listings. These matters are remanded to the MPUC for further deliberations.

VIII. RECORDING AND BILLING SERVICES

US West argues that the MPUC violated § 252(b)(4) and (c) by requiring U.S. West to make its recording and billing services available to AWS to facilitate AWS's collection of termination charges when a third party originates calls that transit U.S. West's network and are then terminated on AWS's network. US West argues that the MPUC did not have the authority under the Act to impose such a requirement.

AWS argues that the MPUC had the necessary authority under § 252(b)(4)(C) as well as § 251(b)(5). The MPUC argues that its authority derived from § 253(b) and state law.

After a request for negotiations has been made, the parties have a duty to negotiate an Interconnection Agreement pursuant to § 251 of the Act. 47 U.S.C. § 252(a)(1). During their negotiations, the parties are not bound by the directives of subsections (b) and (c) of § 251. Id. Essentially, the parties can create an Interconnection Agreement of their choosing that covers any desired aspect of interconnection. In their discussions, the parties are not limited to those matters explicitly enumerated in § 251 or the FCC's rules. If the parties are unable to resolve the issues that formed the subject of their negotiations, § 252(b)(1) provides that a party "to the negotiation may petition a State commission to arbitrate any open issues." (emphasis added). The parties can bring any unresolved interconnection issue before the state commission for arbitration. The parties are again not limited to issues explicitly enumerated in § 251 or the FCC's rules, but rather are limited to the issues which have been the subject of negotiations among themselves.

Section 252(b)(4)(C) provides the authority for a state commission to act during arbitration proceedings, "[t]he State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) of this section upon the parties to the agreement ...." Section 252(c) ("Standards for arbitration") states that:

> In resolving by arbitration under subsection (b) of this section any open issues and imposing conditions upon the parties to the agreement, a State commission shall-
> (1) ensure that such resolution and conditions meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title;
> (2) establish any rates for interconnection, services, or network elements according to subsection (d) of this section; and
> (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

47 U.S.C. § 252(c).

[9] Section 252(b)(4)(C) expressly provides that a state commission "shall resolve each issue set forth in the petition and the response." If an issue has been designated by the parties as in need of resolution by the MPUC, the MPUC has an obligation to address that issue and, as was noted above, the parties may raise any issue concerning which they

have attempted *986 to negotiate a resolution. The language of § 252(c)(1) stating that the state commission shall ensure that the resolution of open issues meets the requirements of § 251, does not confine the resolution of the issues to the requirements of § 251. If a state commission ensures that the resolution meets the requirements of a section, it is merely certifying that the resolution meets the affirmative requirements of the section while simultaneously determining that it does not conflict with or violate the section's affirmative and negative requirements. Not every issue included in the resolution necessarily involves the affirmative requirements of § 251. Thus, the only limitations that § 252(b)(4)(C) and (c) place upon any individual issue addressed by a state commission during arbitration are that the issue must be: (1) an open issue and (2) that resolution of the issue does not violate or conflict with § 251.

[10] Transit traffic was an issue presented by the parties to the ALJ and the MPUC in their matrix of twelve key issues. (A15; Positions on Key Issues at 5). As part of the transit traffic issue, the parties discussed including transit traffic as part of their "bill and keep" arrangement. AWS argued that it should be part of the arrangement and U.S. West argued that it would not be appropriate to include it because transit traffic does not involve a U.S. West customer originating the call. (A15; Positions on Key Issues at 5). The billing of transit traffic was an open issue between the parties and was expressly presented to the MPUC for resolution. Furthermore, as the billing of transit traffic is not expressly addressed by § 251 or the FCC rules, the MPUC's decision to require U.S. West to make its recording and billing services available to AWS does not conflict with or violate § 251. Because this issue met the two requirements of § 252(b)(4)(C) and (c), the MPUC had the authority under the Act to resolve this open issue.

IX. BURDEN OF PROOF

The MPUC created the following burden of proof for the parties: "The burden of production and persuasion with respect to all issues of material fact shall be on U.S. WEST .... The facts at issue must be proven by a preponderance of the evidence. The ALJ, however, may shift the burden of production as appropriate, based on which party has control of the critical information regarding the issue in dispute." (A3) (MPUC Order Granting Petition at 10).

[11] When Congress establishes the burden of proof or production to be applied in an administrative proceedings, the courts must defer to Congress. Steadman v. S.E.C., 450 U.S. 91, 95-96, 101 S.Ct. 999, 67 L.Ed.2d 69 (1981). However, when Congress is silent as to the issue, it is left to the judiciary to resolve the question. 450 U.S. at 95, 101 S.Ct. at 1004.

The provisions of the Act and the FCC rules, which address the issue, place the burden of proof on the incumbent LEC. See 47 C.F.R. §§ 51.5 ("An incumbent LEC that claims that it cannot satisfy such request because of adverse network reliability impacts must prove to the state commission by clear and convincing evidence that such interconnection, access, or methods would result in specific and significant adverse network reliability impacts.") and 51.321(d) ("An incumbent LEC that denies a request for a particular method of obtaining interconnection or access to unbundled network elements on the incumbent LEC's network must prove to the state commission that the requested method of obtaining interconnection or access to unbundled network elements at that point is not technically feasible."). There appears to be no section of the Act or FCC rules that places the burden of proof on the new entrant. The MPUC has admittedly placed a heavy burden of proof on the incumbent LEC, but no evidence has been adduced that such a standard conflicts ***987** with the Act or the FCC rules. [FN14] To the extent Congress and the FCC have spoken to the burden of proof, the MPUC's position does not conflict with their directives.

FN14. The one apparent exception involves the issue of technical feasibility of interconnection. The FCC rules create a clear and convincing standard in relation to this issue while the MPUC created a preponderance of the evidence standard. As this apparent conflict is not relevant to this case, it will not be addressed here.

As for the burden of proof for the remainder of the statute, normally when a federal statute is silent as to the burden of proof in an administrative proceeding, a court would turn to the Administrative Procedure Act

(APA) to fill the void. However the APA does not apply to these proceedings because the MPUC is not a federal agency. Franklin v. Massachusetts, 505 U.S. 788, 800, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). Typically an applicable state statute would determine the proper burden of proof for proceedings before a state agency like the MPUC. In fact, U.S. West argues that the MPUC should have applied the burden of proof for contested case proceedings found in Minnesota Rule 1400.7300, subp. 5. However, because this is a sui generis proceeding, a state agency applying federal law to review telecommunications agreements, at the time of the hearing there was no state law explicitly on point. [FN15] The MPUC was thus left the task of developing an appropriate burden of proof.

> FN15. After the hearing, the MPUC adopted Minnesota Rule 7812.1700, subp. 23 to govern the arbitration of intercarrier negotiations. Minnesota Rule 7812.1700, subp. 23 contains the same burden of proof as the one used by the MPUC in this case. Minnesota Statute § 237.16 authorized the MPUC to promulgate rules governing local competition and to define the procedures for competitive entry and exit. Minn.Stat. § 237.16, subd. 8.

The burden of proof the MPUC selected is in accord with the procompetitive purposes of the Act and realistically reflects the parties access to and control of information. Generally, under federal and Minnesota common law, the proponent of an issue--that is the one who wants to prove the affirmative--has the burden of proof as to that issue. Newport News Shipbuilding and Dry Dock Co. v. Loxley, 934 F.2d 511, 516 (4th Cir.1991) (citing Selma, Rome & D. Railroad v. United States, 139 U.S. 560, 567, 11 S.Ct. 638, 35 L.Ed. 266 (1891); Fleming v. Harrison, 162 F.2d 789, 792 (8th Cir.1947)); Holman v. All Nation Insurance Co., 288 N.W.2d 244, 248 (Minn.1980). However, under both federal and Minnesota common law, questions of fairness, such as the control of information, can alter the disposition of the burden of proof. Fleming, 162 F.2d at 792; Holman, 288 N.W.2d at 248.

[12] In this case, placing the burden of proof on the competitive local exchange carrier ("CLEC") would present an insurmountable barrier to entry into the local telephone market. As the MPUC accurately noted, U.S. West

has held a monopoly in the local telephone market for an extended period of time and as a result largely controls the information about the market. It knows the operation and function of various component elements of its system as well as the costs involved. Thus, fairness supports leveling the playing field by allocating the burden of proof onto the incumbent LEC, the party with the historical advantage.

In addition, the burden of proof established by the MPUC permits for the shifting of the burden in appropriate circumstances, e.g. when the CLEC controls the relevant information. Flexibility is provided to accommodate situations where it would be unjust to leave the burden of proof on the incumbent LEC. Given this flexibility and in light of the control of information as well as the purpose of the Act, the burden of proof standard chosen by the MPUC was appropriate.

X. TAKINGS CLAIM

US West makes a general claim that if the U.S. West-AWS Agreement is upheld, *988 it will result in a taking of U.S. West's property. US West also alleges that requiring U.S. West to permit collocation of RSUs, access to its OSS, and interconnection and access to unbundled elements is a physical occupation of its property, and therefore constitutes a "per se taking under the Fifth Amendment."

In relation to its takings claim, U.S. West states that it is not seeking compensation for the alleged taking but rather that it wishes an injunction to prevent a taking without just compensation. US West appears to be alleging a violation of the jurisdictional grant of the Act. In making its argument, U.S. West relies on Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (D.C.Cir.1994). In Bell Atlantic, the D.C. Circuit determined that 47 U.S.C. § 201 did not vest the FCC with the necessary authority to order LECs to provide physical collocation of equipment upon demand. Id. at 1444-47. It found that because the particular statute did not expressly authorize an order of physical collocation, the FCC could not impose it. Id. at 1447. Bell Atlantic is, however, inapposite to the present case, because, unlike the general Communications statute at issue in Bell Atlantic, 47 U.S.C. § 251(c)(6) expressly provides for limitations being placed on the LECs' property rights, including the requirement that incumbent LECs have a duty to provide for the physical collocation of equipment. See

47 U.S.C. § 251(c)(6). In fact, Congress was aware of the Bell Atlantic decision when it authorized the imposition of physical collocation:

> Paragraph 4(B) [of section 251] mandates actual collocation, or physical collocation, of equipment necessary for interconnection at the premises of a LEC, except that virtual collocation is permitted where the LEC demonstrates that actual collocation is not practical for technical reasons or because of space limitations.... Finally, this provision is necessary to promote local competition, because a recent Court decision indicates that the Commission lacks the authority under the Communications Act to order physical collocation. (See Bell Atlantic Tel. Co. v. Federal Communications Commission, 24 F.3d 1441 (1994)).

House Rep. No. 104-204, at 73 (1995). Therefore, Congress clearly intended to vest the agencies with authority to place limitations on the LECs' property rights.

US West has not only challenged the MPUC's authority to impose these limitations on U.S. West's property, but also claimed that the Agreement approved by the MPUC does not fully compensate U.S. West for the taking of its property. This is a traditional takings claim allegation and the Court will therefore apply a traditional takings claim analysis.

The defendants argue that U.S. West's taking claim must fail because: (1) it exceeds the scope of this Court's jurisdiction, which is limited by 47 U.S.C. § 252(e)(6); (2) the claim is not ripe for review; and (3) the agreement contains provisions which allow for full cost recovery by U.S. West.

[13] The Eighth Circuit explicitly noted that a takings claim can be presented to a federal district court under the review provisions of subsection 252(e)(6). Iowa Utils., Bd., 120 F.3d at 818. Therefore, this Court has jurisdiction to hear the takings claim.

[14] In order for a takings claim to be ripe, two elements must be met: (1) the administrative agency has reached a final, definitive position as to how it will apply the regulation at issue, and (2) the plaintiff has attempted to obtain just compensation through the procedures provided by the State. Williamson Co. Regional Planning v. Hamilton Bank, 473

U.S. 172, 191, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985). Here, neither of these elements have been satisfied.

[15][16] The Fifth Amendment states that, "private property [shall not] be taken for public use without just compensation." The Takings Clause is not meant to limit ***989** the government's ability to interfere with an individual's property rights, but rather to ensure compensation when a legitimate interference that amounts to a taking occurs. Glosemeyer v. Missouri-Kansas-Texas Railroad, 879 F.2d 316, 324 (8th Cir.1989) (quoting First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987)). The compensation does not have to precede the taking; a process for obtaining compensation simply has to exist at the time of the taking. Id. (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1016, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984)). If U.S. West ultimately receives just compensation then there has been no violation of the Takings Clause.

Public utilities, which have a hybrid public and private status, must be analyzed in a slightly different manner than other entities under the Takings Clause. [FN16] Duquesne Light Co. v. Barasch, 488 U.S. 299, 307, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989).

FN16. Although the traditional public utility rate model is not a perfect model for § 252(e)(6) cases, it is informative. See J. Gregory Sidak & Daniel F. Spulber, Deregulatory Takings and Breach of the Regulatory Contract, 71 N.Y.U. Law Rev. 851, 954 (Oct.1996).

The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597, 17 S.Ct. 198, 205-206, 41 L.Ed. 560 (1896) (A rate is too low if its is "so unjust as to destroy the value of [the] property for all the purposes for which it was acquired," and in so doing "practically deprive[s] the owner of property without due process of law"); FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 62 S.Ct. 736, 742, 86 L.Ed. 1037 (1942) ("By long standing usage in the field of rate regulation, the 'lowest reasonable rate' is one which is not confiscatory in the constitutional sense"); FPC v. Texaco Inc., 417 U.S. 380, 391-392, 94 S.Ct. 2315, 2323, 41 L.Ed.2d 141 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level").

Id. at 308, 109 S.Ct. 609. If the state fails to provide sufficient compensation, then the state has taken the use of a utility without just compensation and thereby violated the Takings Clause. Id. The particular theory used to determine whether a rate is fair does not matter. Id. at 310, 109 S.Ct. 609 (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333 (1944)). If the overall effect cannot be said to be unreasonable then judicial inquiry is at an end. Id. (citing FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333 (1944)). Whether a rate is unfair depends on what is a fair rate of return given "the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return." Id. "Rates which enable [a] company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk assumed certainly cannot be condemned as invalid ...." Hope Natural Gas, 320 U.S. at 605, 64 S.Ct. 281.

[17] The purpose of the Telecommunications Act of 1996 is, in part, to foster competition in the local telephone market. GTE North, Inc. v. McCarty, 978 F.Supp. 827, 831 (N.D.Ind.1997) (citing Joint Explanatory Statement of the Committee of Conference, H.R.Rep. No. 104-458, at 113 (1996)). Under the Act, U.S. West provides services to its competitors rather than the public. 47 U.S.C. § 251(c). The end goal is not a fair rate of return as in the traditional rate-setting paradigm, but rather the equitable opening up of a market. Neither party to the Agreement is expected to profit in the interconnection or resale processes. See 47 U.S.C. § 251(c)(4)(A) ("to offer for resale at wholesale rates ..."). Because these transactions are not designed to be profitable, ***990** the analysis cannot be fair rate of return as to any individual provision concerning the sale or access of services to the CLECs. Rather the query must be whether any provision or provisions of the Agreement negatively affect the overall operation of the incumbent LEC to such a degree that it can

no longer receive a fair rate of return from its investment.

[18] In this case, it is premature to ask this question for two reasons. First, the MPUC has not reached a final decision concerning the prices for unbundled elements; they are still subject to a true-up procedure at the end of the Generic Cost Investigation. Until the MPUC reaches a decision on that issue, the overall effect of the Agreement cannot be determined and the takings claim is not ripe for review. Second, the incumbent LEC still has an opportunity to have its public rates increased in light of the MPUC's Orders made pursuant to §§ 251 and 252. If U.S. West is not earning a sufficient return on its investment in Minnesota, it can petition the MPUC for a rate change. See Minn.Stat. § 237.075. The MPUC is obligated to implement a rate base upon which a telephone company can earn a fair rate of return. See id., subd. 6. U.S. West will not have exhausted its state remedies until it has taken this final step. It would only be after such a hearing that a court could determine whether the overall utility rates are "inadequate to compensate current equity holders for the risk associated with their investments under a modified prudent investment scheme." Duquesne Light Co. v. Barasch, 488 U.S. 299, 312, 109 S.Ct. 609, 102 L.Ed.2d 646 (1989). The MPUC's actions under the Act establish LECs relationships with one another; the equation is not complete until the economic relationship with the public is determined in light of the intercarrier relationships. Because Minnesota offers an opportunity to U.S. West to have its rates readjusted, U.S. West has not yet exhausted its state remedies and its takings claim is ripe for review. US West's takings claim is therefore dismissed without prejudice.

CONCLUSION

Based upon the foregoing, and all of the files, records and proceedings herein, IT IS HEREBY ORDERED that:

1. US West's request that this Court find that the MPUC's determinations concerning the U.S. West-AWS Agreement violates 47 U.S.C. §§ 251 and 252 is GRANTED IN PART, DENIED IN PART, and DENIED WITHOUT PREJUDICE IN PART. It is granted with respect to: (1) Count I (operational support systems as an open issue); (2) Count IV (the collocation of RSUs); and (3) Count VII (the regulation of U.S. West Dex). It is denied without prejudice with respect to Count IX (U.S. West's

takings claim) and Count V (the "pick and choose" provision). It is denied in all other respects. The matter is remanded to the MPUC for further determinations consistent with this decision.

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Rebuttal Testimony of James C. Falvey

Exhibit 6

ALJ/TRP/avs

Mailed 9/3/99

Decision 99-09-029 September 2, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion Into Competition for Local Exchange Service.	Rulemaking 95-04-043 (Filed April 26, 1995)
Order Instituting Investigation on the Commission's Own Motion Into Competition for Local Exchange Service.	Investigation 95-04-044 (Filed April 26, 1995)

ISP ROUTING & RATING / RECIP. COMP.

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INTERIM OPINION

By this decision, we address the policy relating to the use of central office (NXX) codes to provide locally-rated calling to customers which physically reside beyond the local calling area of the designated NXX code. To the extent customers are assigned NXX prefixes which correspond to a rate center in a different exchange from where the customer physically resides, we resolve the dispute as to how such calls should be rated. In addition, we order further hearings to consider questions concerning the appropriate intercarrier compensation for the transport and delivery of these types of calls.

I. Background

Our consideration of this generic issue was initiated in response to a dispute over the propriety of certain rating and routing practices as brought before the Commission in a complaint (C.96-10-018) filed by Pac-West Telecom, Inc., (Pac-West) a competitive local carrier (CLC). Pac-West filed a second complaint (C.98-04-046) raising similar issues. The dispute in these complaints involved the manner in which NXX prefixes are assigned to end-use customers located in foreign exchanges, and the resulting effects on call rating and intercarrier compensation. The dispute raised questions about the traditional way in which the rating and routing of calls has been determined, and the issue of whether the methods of rating and routing advocated by Pac-West should be permitted, prohibited, or allowed with some modifications. We resolved C.96-10-018 in Decision (D.) 97-12-094, but also noted that the disputed issues raised in the Pac-West complaint had implications for the local exchange market as a whole, and directed that the issues be examined on a generic basis in this rulemaking proceeding. Although these generic issues have applicability to telephone number assignments generally, the dispute in the Pac-West complaint arose specifically in the context of number assignments made to Internet Service Providers (ISPs). An ISP offers Internet access to the public typically through a telephone line dial-up linking the customer and the ISP modem. By virtue of the type of service offered by an ISP, telephone calls are always originated from a caller seeking Internet access and terminated to the ISP. In addressing the disputes raised by the Pac-West complaint on a generic basis, we shall consider the effects as they relate to telephone customers generally, with particular attention to ISP customers.

As a framework to address these issues, a brief review of industry practices for the rating and routing of telephone traffic is in order. The rating of telephone calls by wireline carriers is based on a geographically determined system which classifies calls as local, intra local access and transport area (LATA) toll, or interLATA long distance. Telephone numbers are assigned by a neutral Code Administrator[1] to telephone carriers in blocks of 10,000 numbers based upon the North American Numbering Plan (NANP). Each 10,000-number block is identified by a three-digit area code (or Number Plan Area, NPA), followed by a three-digit (NXX) central office code. Every NPA-NXX code corresponds to a unique "rate center," which is a designated geographical point within an exchange from which calling distances are measured to determine any retail toll charges for calls between telephone numbers. Every rate center is identified by vertical and horizontal (V&H) coordinates analogous to longitude and latitude

[1] The NANP Administrator is an industry-neutral representative responsible for assigning NXX codes to telecommunications service providers upon their request. The service providers include in their request the designated rate center to be associated with the NXX prefix for call rating purposes.

lines used in navigation. These V&H coordinates are used to calculate mileage between rate centers for rating purposes.

Within the traditional local exchange monopoly setting, the practice of rating and routing of calls was generally not controversial. Calls were rated based upon geographically defined rate centers within local exchanges established by the Incumbent Local Exchange Carriers (ILECs). In the event a customer wanted callers in a distant location to be able to reach them by dialing a local number, the customer could pay an additional charge for foreign exchange service which was provided through separate dedicated facilities.

Since the opening of the local exchange market to competition, new questions have arisen concerning the proper rating, routing, and associated intercarrier compensation for telephone traffic. Issues relating to rating and routing practices and associated intercarrier compensation have become more controversial as multiple carriers become involved in the delivery of a telephone message from its origination to its termination, and with the proliferation of new technologies and specialized markets, particularly for Internet usage.

II. Review of the Pac-West Serving Arrangement

Since the generic consideration of the issues before us resulted from a dispute over the specific transactions at issue in the Pac-West complaints, we review the events which gave rise to the complaints, and the serving arrangement devised by Pac-West.

In early 1996, the Commission opened the local exchange market to competition within the service territories of Pacific Bell (Pacific) and GTEC California (GTEC). Pac-West was among the CLCs entering the local exchange market. In response to the growing demand for Internet access, Pac-West designed a service offering targeting the ISP market. Specifically, Pac-West offered ISPs in Stockton with locally-rated telephone access to prospective customers residing in outlying rural exchanges which would otherwise incur toll charges to call Stockton.

Pac-West designed the service so that a Stockton-based ISP could simply obtain telephone number prefixes which were rated as local numbers within the Crows Landing and Jackson exchanges which were located beyond the local calling radius of Stockton. In order to offer this service, Pac-West obtained a NXX code with the same rate center as an existing Pacific NXX code in Crows Landing, and another NXX code with the same rate center as an existing Pacific Bell rate center in Jackson.

The ISP located in Stockton, thereby gained a local presence in these exchanges without having to install facilities there. Pac-West likewise had neither customers nor facilities physically located in the Crows Landing or Jackson Exchanges at the time. Pac-West's switch was located in Stockton and connected to Pacific's Stockton access tandem. Pac-West entered instructions in the Local Exchange Routing Guide [2]that calls to these NXXs be routed to Pacific's tandem switch in Stockton.

In this manner, Pac-West intended that callers within the local calling radius of the Crows Landing and Jackson exchanges could avoid toll charges by dialing the Stockton-based ISP's access number locally rated from those exchanges.[3] This strategy particularly targeted customers located in the

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[2] Once an NXX code is assigned to a carrier, instructions are entered into the Local Exchange Routing Guide (LERG), a centralized industry database system prescribing the call's rating and physical routing to its ultimate destination. Carriers involved in the routing of calls refer to the LERG instructions to determine call routing pathways.

[3]. By D.90-11-058, the Commission established an extended local calling area (ELCA) of up to 12 miles between rate centers. Calls within 12 miles are treated as local calls and

Footnote continued on next page

Patterson and Volcano exchanges (which were adjacent to the the Crows Landing and Jackson exchanges, respectively).

Since the Jackson and Volcano rate centers are within a 12-mile radius, a call from a Volcano NXX to a Jackson NXX would be rated as a local call. Customers could thus place calls between these exchanges without a toll charge and without a charge for Extended Area Service (EAS). Similarly, a call from a telephone customer in Patterson to a Crows Landing NXX is rated as a local call. By contrast, calls from customers located in the Volcano or Patterson exchanges to Pacific's Stockton rate center would be rated as intraLATA toll calls since the calling distance extends beyond 12 miles.

Telephone customers in the Patterson and Volcano exchanges are served by two small independent local exchange carriers, Evans Telephone Company (Evans) and Volcano Telephone Company (Volcano), respectively. Evans and Volcano viewed Pac-West's rating and routing practices as an improper manipulation of the telecommunications network intended to cause calls to be carried on intraLATA toll facilities while denying Evans and Volcano the ability to collect toll charges from their end-use customers. Evans and Volcano initially declined to follow Pac-West's routing instructions to deliver the calls to ISPs in Stockton while billing their own customers as if the calls were local calls to Crows Landing and Jackson.[4] Evans and Volcano routed the traffic to the Jackson and Crows Landing exchanges. Since the called parties were ISPs

do not entail toll charges. Calls beyond 12 miles do incur toll charges, based on the distance between the rate centers of the calling and called parties.

4 Traffic between Volcano Telephone's Volcano exchange and Pacific Bell's Jackson exchange is carried on direct cross-boundary Volcano-Pacific Bell trunks between the Volcano and Jackson central offices. This traffic does not pass though Stockton.

actually located in Stockton, however, the calls failed to complete and never reached the ISPs. This dispute over call routing gave rise to C.96-10-018 filed by Pac-West, a complainant against Evans and Volcano.

We subsequently issued D.97-11-024 in the Local Competition Docket, prescribing that all carriers must complete calls where it is technically feasible to do so regardless of whether they believe that the underlying intercarrier compensation arrangement or call rating designation is proper. While carriers are entitled to just and reasonable compensation for the completion of calls over their facilities, D.97-11-024 specified that the resolution of such disputes over compensation must necessarily be resolved after the physical routing of calls has been completed.

D.97-12-094 was subsequently issued in C.96-10-018, requiring Evans and Volcano to route the disputed calls to their Stockton destination even though the designated rate centers were located elsewhere. D.97-12-094 reached no final conclusions on intercarrier compensation, but permitted Evans and Volcano to file separate applications to seek recovery of any intercarrier compensation for calls from their customers to Pac-West's ISP customers.

While Evans and Volcano complied with D. 97-12-094 by routing calls to the Stockton ISPs, they began rating the calls as toll calls based upon the distance from the call origination point to its termination point in Stockton. Pac-West filed a subsequent complaint in response (C.98-04-046), arguing that the calls should be rated as local calls based upon the designated rate center of the assigned NXX prefix of the called number. A preliminary injunction was issued by D.98-07-095 enjoining Evans and Volcano from charging toll rates for calls in question. A subsequent decision closing the complaint, D.99-02-096, directed that the disputed calls should continue to be rated as local at least on an interim basis pending the outcome of the Commission's generic deliberations on this issue in the Local Competition rulemaking. D.99-02-096 reached no conclusions, however, as to the ultimate policy issue of whether calls of this nature should be rated as local calls as a generic industry practice, and if so, what intercarrier compensation or other relevant issues needed to be addressed.

An ALJ ruling was issued in this proceeding on July 22, 1998, soliciting parties' comments on the disputed rating and routing issues noted above in the generic context of how these rating and routing issues should be addressed in terms of industry-wide rules. Opening comments were filed on August 31, 1998, and reply comments were filed on September 18, 1998. Comments were filed by the several ILECs, including Pacific Bell, GTE California, Inc., and Citizens, as well as two groups of small independent ILECs. Comments were also filed by various CLCs, and by two Certificated Mobil Radio Sense (CMRS) carriers. The Commission's Office of Ratepayer Advocates (ORA) also filed comments.

III. Overview of Parties' Positions

Parties' representing the interests of ILECs generally claim that Pac-West, and potentially other CLCs, have misused the assignment of NXX prefixes so as to avoid payment of intercarrier compensation and to prevent originating carriers from charging toll rates to their customers for calls to those NXX prefixes. The ILECs generally believe evidentiary hearings are warranted before the Commission adopts any policy permitting the Pac-West arrangement on a general basis.

On the other side of the argument are the CLCs, CMRS providers, and ORA, all of which argue that carriers should be free to establish different rating and routing points for NXX prefix assignments in the interests of network efficiency and competition. The CLCs claim that any disputes over intercarrier compensation issues are best left to negotiations between parties to interconnection agreements, and should not be the subject of a generic Commission rule.

The parties' dispute raises the following questions: (1) how much flexibility should telecommunications carriers have in how they provide a local presence to customers which are physically located in a distant exchange? (2) does the Pac-West arrangement provide such service in a technologically and economically efficient manner? (3), if so, how should compensation for the provisioning of such service be determined, both in terms of retail rates and wholesale intercarrier compensation for routing, switching, and termination of the call to its destination?

The question of whether, or under what conditions, a carrier may designate different rating and routing points for the same NXX prefix could have multiple consequences both to carriers and to customers. Separate effects must be considered on the carrier and its associated customer originating a call, as well as the carrier and its associated customer receiving the call. The rating of the call as local or toll may potentially affect how intercarrier compensation is provided for under the terms of carriers' interconnection agreements

For business customers such as ISPs, which seek to provide a local presence to their own customers located in multiple exchanges, we shall consider how changes in the terms or cost of providing such service may affect business profits and, more broadly, the competitive choices for Internet service available to the public.

IV. Substantive Issues

A. Is The Use of Different Rating and Routing Points Appropriate?

1. Parties' Position

Parties dispute whether a carrier seeking to provide customers (such as ISPs) with a local presence in a foreign exchange may do so by simply assigning the customer a NXX prefix rated in a different exchange from where calls are routed. Such an arrangement avoids the need for the serving carrier to construct separate dedicated facilities between the home exchange of the ISP and the foreign exchange.

We have permitted this arrangement for calls between customers of Evans and Volcano and ISPs served by Pac-West at least on an interim basis as prescribed in D.97-12-094. We stated therein, however, that Pac-West's ability to assign NXXs out of Jackson and Crows Landing to Stockton-based ISPs was subject to change pending the outcome of our generic deliberations in this generic proceeding.

CLCs generally support carriers' rights to utilize the serving arrangement developed by Pac-West, characterizing it as a competitive innovation. CLCs oppose being required to conform to the same foreign exchange serving arrangements used by an incumbent provider as being economically inefficient and anticompetitive.

Parties representing CLCs argue that the Commission should allow CLCs to obtain NXX codes in a rate center where the CLCs do not have customers physically present and to assign numbers from those NXX codes to the CLCs' customers located in a different exchange so as to allow CLCs to compete with ILEC foreign exchange service.

As described in D.94-09-065:

> "Foreign Exchange Service (FEX) permits a customer in Exchange "A" (home exchange) to have a telephone number associated with Exchange "B" (foreign, or dial tone exchange). This allows a customer to have a telephone number presence in a community other than the one where the terminating customer equipment is physically connected to the network.

(D.94-09-065, 1993 Cal PUC LEXIS 649, 87, emphasis added.)

CLCs generally serve large geographic areas with a single switch, due to the use of both fiber optics and digital technologies, while the ILECs continue to use their legacy architecture. Accordingly, CLCs are able to directly route traffic to their switch rather than routing it through multiple switches as the ILECs do. The CLCs characterize this approach as a more efficient functional equivalent of foreign exchange service.

The CLCs argue that it would be grossly unfair and contradictory to the competitive environment the Commission has sought to foster, and illegal under the 1996 Telecommunications Act, were the Commission to enact rules preventing CLCs from actually offering foreign exchange service and competing in the marketplace. Thus, CLCs argue that they must be able to open NXX codes in exchanges where they do not have customers and then assign numbers from those NXX codes, and route calls made to them to customers physically located in a different area.

Incumbent providers generally object to a CLC's use of such arrangements to provide foreign exchange service, arguing that the arrangement is merely aimed at avoiding payment for the use of other carriers' facilities and services. Foreign exchange service has traditionally been provided through dedicated facilities linking the customer's home exchange with the foreign exchange. The carrier providing such service would thereby bear the cost of transporting calls over the dedicated private line connection and recover such costs from its end user (e.g., the ISP) subscribing to the service.

Unlike traditional foreign exchange service, no dedicated facilities are provided by Pac-West linking the ISP's home and foreign exchanges. As such, parties complain that Pac-West and the ISP subscribers get a "free ride" at the expense of other carriers who must use their own facilities to deliver the calls from the foreign exchange to the ISP.

Pacific and the smaller LECs characterize Pac-West's rating and routing arrangement as a substitute for traditional foreign exchange service and/or "800" wide area toll-free service in a manner which is intended to avoid paying additional costs as would normally be required for such services. Industry standard practices for providing inbound toll-free wide area calling service offerings, entail the use of an 800 or 888 NXX prefix by the customer. The calls would be transmitted to Pac-West over the network, and Pac-West would pay access charges for the origination and transmission of the traffic to the Pac-West point of interconnection. Pac-West could charge its customer based on hours of usage or whatever other rate structure Pac-West chose to use.

The small LECs contend, however, that Pac-West and other CLCs are attempting to provide "800-equivalent" inbound wide area toll-free calling service without paying the tariffed access charges (as would be paid for an "800" service) to the carriers originating the traffic or tariffed toll charges for long distance service.

If Pac-West desires to provision the calls as toll-free inward long distance traffic, then Pac-West is obliged to pay to the originating carriers the same tariffed access charges as are applicable to other "800" traffic, according to the small LECs. Pacific argues that such rating and routing practices are merely an attempt to portray toll-free calling as a local call so as to circumvent obligations to pay intercarrier compensation which would otherwise be required under an interconnection agreement. The CLC may thereby sell the service to ISPs at little or no additional charge. Typically, a customer pays more for foreign exchange or "800" service than for basic service.

Pacific recommends that the Commission prohibit disparate rating and routing of calls to NPA NXX codes as a way to ensure the efficient use of NPA NXX codes. Pacific argues that it is an inefficient use of numbering resources for a carrier to obtain a 10,000-number NXX code merely to provide a few numbers to ISPs on a foreign exchange basis while the remaining numbers go unused. Pacific is not suggesting, however, that Pac-West or any other carrier wanting to create incoming call networks are limited to building dedicated facilities to each office from which the ISP wants to receive incoming calls. Pacific does suggest a "wide-open consideration of solutions" through evidentiary hearings. Pacific suggests consideration of solutions involving call forwarding type features with reasonable pricing of the forwarded call, and any other solution to creatively resolve the issue.

GTEC believes CLCs and ILECs should both be permitted to designate rate centers for NXX codes in exchanges where there are no physical customers served provided two prerequisites are satisfied: (1) the carrier assumes responsibility for managing the transport of the traffic from the exchange area associated with the NPA/NXX back to the location of the switch; and (2) "appropriate" interconnection agreements are negotiated with all other potential interconnecting carriers specifying procedures for the exchange of traffic in the rate center area where the NPA/NXX is opened. In addition, GTEC believes the NXX code must have a rate center (V&H coordinates) consistent with the ILEC's listing of state approved rate centers.

GTEC argues that it is unfair to place the operational and financial burden for delivering the traffic to the requesting carrier on the originating carrier in a manner that permits the requesting carrier to avoid its responsibility to jointly manage the interconnection of its network with the networks of other carriers. GTEC believes that these issues should be resolved up-front in a negotiated interconnection agreement to ensure that all affected parties jointly participate in determining how best to accomplish the exchange of traffic and the appropriate level of compensation for doing so.

2. Discussion

In the interests of opening the local exchange market to competition, we have provided flexibility to CLCs in how they design their networks and service offerings. As long as a CLC does not violate requirements of the Telecommunications Act nor breach provisions of its interconnection agreement with other carriers, CLCs have been permitted to configure their network facilities as they choose.

In order to limit CLCs to offering foreign exchange service only through provision of their own dedicated facilities, the CLCs argue they would have to construct switching facilities in every local exchange where service was to be offered. It would be technologically and economically inefficient, however, to require the CLC to construct switching facilities in every local exchange in which it sought to provide a local presence to its customers. Such a requirement would be inconsistent with the way in which many CLCs have engineered their networks. Various CLCs have achieved efficiencies by locating a small number of concentrated switches near Pacific's tandems, as opposed to locating switches in a large number of wire centers. As a result, such

CLCs typically serve a much larger number of rate centers and their associated NXX codes from a single switch than do the ILECs.

In the present instance, we find no basis to require a CLC to establish separate switching facilities in each exchange where it seeks to offer foreign exchange service merely because that is how the ILEC configures its network. CLCs should have the discretion to negotiate interconnection agreements consistent with differences in the CLC's network configuration relative to that of the ILEC. Depending on the network configuration involved, it may make economic sense for carriers to negotiate interconnection agreements whereby the ILEC performs the transport of traffic to a centralized switch, rather than the CLC installing a separate switch in every exchange where it seeks to offer telephone service. In such a situation, the CLC could arrange for calls to be rated in a different exchange from where the calls are routed, and would not have to construct its own dedicated private line to link an ISP to a foreign exchange. Moreover, a number of interconnection agreements already executed between ILECs and CLCs explicitly provide that the rating and routing points for calls need not match, although they must be in the same LATA as the rate center of the called party's NXX prefix. AT&T provides examples of such agreements in its reply comments. Thus, a prohibition on the use of different rating and routing points would be in conflict with those existing interconnection agreements.

Citizens claims that the provision for 911 emergency services will be adversely impacted if PacWest's rating/routing system is extended to apply to all residential and traditional business services.[5] As Pac-West notes, however, the rating or routing criteria published in the LERG, which is the source typically used by interconnecting carriers to route and rate calls, is irrelevant to E-911 functionality. Instead, the routing of E-911 calls and the provision of address information to the appropriate Public Service Answering Point ("PSAP") is based on specific records entered into the E-911 Database Management System. These records identify the actual geographic location of the terminating point of any E-911 capable end-user lines, i.e., the actual physical location of customers' premises, not their assigned rate centers. Therefore, we conclude that the provision of foreign exchange services provided by Pac-West utilizing switch-based routing technology does not adversely affect E-911 service.

We disagree with Pacific's claim that the Pac-West service arrangement should be prohibited because it contributes to the inefficient use of NXX number resources. While we are acutely aware of the statewide numbering crisis and are actively taking steps to address it, we do not believe that imposing restrictions or prohibitions on CLC service options is a proper solution to promote more efficient number utilization. Under present industry rules, a carrier seeking to provide service in a given rate center must obtain NXX codes in blocks of numbers no smaller than 10,000. This requirement applies whether the customer being served is an ISP or any other customer. Moreover, there is no reason to conclude necessarily that a carrier will use any NXX code only to provide service to ISPs which are located outside of the assigned NXX rate

5 In the case of ISP access service, as offered by Pac-West, the facilities are one way in the inbound direction. In such cases, since an ISP would not make an outgoing call the question of E-911 capability is not implicated at all.

center. For example, both Pac-West and WorldCom report they are actively pursuing numerous opportunities to provide profitable telecommunications services throughout their service areas. Their current subscribers include paging companies that have a significant demand for local DID numbers, which they, in turn, assign to local end users who typically are physically located in the assigned rate centers. Customers also include banks, retail stores, and other businesses, both located inside and outside the assigned rate centers.

Rather than imposing policies restricting carriers' service options, we believe the proper approach is to provide incentives for carriers to expand their service offerings so that NXX codes will become more fully utilized.

Accordingly, we find no basis to prohibit carriers from assigning NXX prefixes rated for one exchange to customers located in another exchange as a means of offering a local presence where such an arrangement is technologically and economically efficient, and where intercarrier compensation is fairly provided. We shall not prohibit CLCs from designating different rating and routing points just because such an approach may differ from traditional methods used by ILECs. Such a prohibition could undermine the incentives for carriers to develop innovative service alternatives in the most economically and technologically efficient manner.

While we recognize carriers' discretion to make such use of NXX prefix assignments from a foreign exchange where economic efficiencies warrant it, we expect carriers to negotiate reasonable intercarrier compensation arrangements for the routing, switching, and for the use of facilities to deliver such calls. The compensation provided to carriers involved in the transaction may be influenced by how compensation is provided by end use customers originating and receiving such calls. Accordingly, we address the question of end-user retail compensation and associated call rating issues below. We address the issue of intercarrier compensation in Section C below.

B. Does the Pac-West Approach Provide a Legitimate Basis For the Rating of Calls as Local?

The issue of how calls should be rated under the Pac-West arrangement previously arose in the context of the Pac-West v. Evans and Volcano complaint (C.98-04-046) In D.99-02-096, we required that such calls not be rated as toll, at least on an interim basis, but should be rated from the rate center of the assigned NXX prefix. We deferred to this rulemaking, however, the generic question of how such calls should be rated as a prospective industry policy.

1. Parties' Positions

Parties dispute how to rate calls which are terminated beyond the local calling area of the originating caller even though the assigned telephone numbers have a local NXX prefix. The ILECs generally argue that calls should be rated based on the physical location of the calling and called parties. They would rate a call as toll when the physical distance between the originating and terminating points of a call exceed the 12-mile local calling limit, even if the NXX prefix has been designated for a rate center within the 12-mile local calling area.

The small LECs characterize the practice of disparate rating and routing of calls as "false labeling" of the call destination. The small LECs argue that call rating should reflect the actual points of origination and termination of a call and not a "fictitious" NXX rating "destination." The small LECs claim a call is properly rated as either "local" or "long distance" based on the distances between the exchanges in which the calling and called party are located.

Volcano and the other small LECs generally concur in Pacific Bell's intraLATA toll tariff, which defines a toll call as a "telephonic communication between two exchange stations located in different local service areas." (Emphasis added.)[6] Based on this tariff description, the small LECs claim that the rating of calls is based on the physical proximity of the parties, such that calls between parties located in different local exchanges must be rated as toll calls. Under their premise, toll charges thus apply to calls made by Evans and Volcano customers to Stockton ISPs.

The small ILECs also express concern that the establishment of disparate rating and routing points threatens their system of cost recovery from pooled toll and access revenue as prescribed by the FCC in its Part 36 rules entitled "Jurisdictional Separation Procedures For Telecommunications Companies." (See 47 CFR §§ 36.1 et. seq.) The small LECs raise the concern that CLCs will increasingly use disparate rating and routing practices to reclassify what would otherwise be toll traffic as local. The small LECs warn that as more and more traffic is reclassified as local, the rate of return of the toll and access pool will correspondingly be reduced. The Commission would then be faced with the need to raise local service rates to make up for the cost of transporting this traffic, according to the small LECs.

The CLCs argue that the rate center designation of the called party's NXX prefix should determine the rating of the call as local or toll. Pac-West's use of different rating and routing points for the same call destination

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[6] Pacific Bell Tariff Schedule A6 Message Telecommunications Service, Sec. 6.2.1 (A)(1).

is entirely premised on calls originating within 12 miles of the designated rate center for the NXX prefix of the called party being rated as local. If, in fact, such calls were rated as toll to end-users, it would defeat the underlying purpose of using different rating and routing points. Thus, resolving the dispute over call rating has a decisive impact on whether the basic Pac-West arrangement is feasible at all.

Comments were also filed by the Allied Personal Communications Industry Association of America (Allied) and by Los Angeles Cellular Telephone Company (LACTC), representing the views of commercial mobile radio service (CMRS) carriers. LACTC argues that any alleged problem (if one exists) with Pac-West's manner of rating and routing calls is carrier-specific, and does not warrant any industry-wide changes in call rating or routing methods.

LACTC takes issue with the claim of the small LECs that call rating "should reflect the actual points of origination and termination of a call" arguing that such a rigid call rating rule would be in conflict with call rating practices of CMRS carriers. Mobile technologies are designed to carry telephone messages to and from customers whose location is constantly changing. A mobile customer may travel from one exchange area to another during a single telephone call. Yet as long as carriers choose to file distance-sensitive tariffs, a <u>fixed</u> rating point must be assigned to the called number. For mobile technologies, such a rating point will always be "fictitious." Any attempt to substitute a rating system based on the actual physical location of the mobile customer is not possible under current technology. Whether the terminating carrier is a CLC or CMRS provider, the principles of network efficiency require routing to the nearest point of presence of the terminating carrier, and <u>not</u> to the physical location of the called party, or to the rate center assigned to the called number. This principle is especially important in a CMRS context because the mobile unit will seldom, if ever, be physically located within the designated rate center. LATC warns that any rule requiring physical links between terminating carriers and each rate center, and further requiring originating carriers to route calls to the rate center, rather than directly to the terminating carrier, would result in an unnecessary duplication of facilities, and additional transport obligations for both originating and terminating carriers.

In the case of LACTC's interconnection agreements, Pacific and GTEC may route calls to the LACTC mobile telephone switching office (MTSO) which is nearest to the originating tandem. At the same time, LACTC is permitted to designate separate rating points for each of its NXX codes. This allows LACTC cellular customers to obtain numbers which, for rating purposes, are located in the geographic area from which the mobile customer expects most of its calls. Under these agreements, there is no obligation for the originating carrier actually to transport calls to either the rating point, or the actual location of the mobile unit. Instead, Pacific and GTEC simply transport all of their calls in the least costly way to the nearest LACTC point of Interconnection. LACTC then assumes transport and termination responsibilities.

2. Discussion

As discussed below, we conclude that the rating of calls as toll or local should be based upon the designated rate center of the NXX prefix of the calling and called parties' numbers. Even if the called party may be physically located in a different exchange from where the call is rated, the relevant rating point is the rate center of the NXX prefix.

The basis for rating calls generally is set forth in carriers' retail tariffs. Typically, the smaller independent LECs have concurred in the toll tariff provisions applicable to Pacific Bell wherein a "toll message" is defined as:

"A completed call or telephonic communication between two exchange stations located in different local service areas, between toll stations, or between a toll station and an exchange station to which rates are applicable in accordance with the provisions of the toll rate tariff." (See footnote 7.)

This tariff language expresses the underlying principle that toll rates are based upon the geographic location of the exchanges of the calling and called parties. More specifically, toll rates are measured based on the distance between the rate centers of the calling and called parties. Yet, the tariff also prescribes that rates are applicable "in accordance with the provisions of the toll rate tariff." The applicable provisions of the toll rate tariff appear in Pacific's Tariff Section A6, "Message Telecommunications Service." Under Subsection 6.2.1.A.4(1), the tariff prescribes that: "Toll rates between points (cities, towns, or localities) are based on the airline distance between *rate centers.*"(emphasis added). Each rate center, in turn, is identified by tariff with a unique NPA NXX code. Thus, it is the applicable rate center as identified by telephone number prefix, not the physical location of the calling or called party that is used to rate calls.

Where the designated rate center of the called party's NXX prefix is in the same exchange as the called party resides, the rating of the call would be toll if the distance from the originating caller's rate center exceeded 12 miles. The toll tariff language, however, does not explicitly address the situation where the rate center of the assigned NXX prefix of the called party is in a different exchange from the physical location of the called party.

Yet, there are established types of calling arrangements where the rate center used for rating of calls is located in a different exchange from where the called party resides, as noted above. One notable example involves called parties who are customers of CMRS providers. As previously noted, in the case of interconnection agreements involving CMRS providers, there is no obligation for the originating carrier to route calls to either the rating point or the actual location of the mobile unit. No party has challenged the validity or fairness of such interconnection arrangements with CMRS providers. We find no reason to question the reasonableness of those arrangements.

Another generally recognized exception to the matching of rating and routing points is foreign exchange service. We conclude that under a foreign exchange service arrangement, it is consistent with the applicable tariffs to rate calls in reference to the rate center of the assigned NXX prefix even though it is in a different exchange from where the called party is located. The use of foreign exchange service does not contradict the principle of geographically-based rating of calls, but is a way to transfer the geographic rating point of the called party from one exchange to another. By designating the service as "foreign" exchange, the reference point for rating remains geographically based even though it has been relocated. Thus, foreign exchange service provides for a called party to reside in one exchange, but still to have a telephone number rated as local served from a foreign exchange.

An underlying dispute over Pac-West's use of different rating and routing points is whether the rating of calls as local can be justified as a form of foreign exchange service. Pac-West claims calls to its ISPs should be rated as local since its service is merely a form of foreign exchange service which has been offered by the ILECs for years. Pac-West, however, does not identify its ISP tariff by name as "foreign exchange service," but merely as "Type 6" service.

Opposing parties object to the characterization of Pac-West's service as foreign exchange since Pac-West has failed to pay for any dedicated facilities. One method of providing foreign exchange service involves dedicated facilities connecting the central office associated with the customer's assigned NXX prefix and the central office where the customer wishes to have the new "foreign exchange" NXX prefix, i.e., in a location where the customer is not physically located. [7] Under this method, the carrier typically has charged the customer for the costs of providing the dedicated facilities necessary to transport the call from the home exchange to the foreign exchange. The customer has paid these additional charges through a tariff designated as "foreign exchange service". The Pac-West service provides no such designation, nor separately stated charges for providing the foreign exchange prefix.

For purposes of considering the issue of call rating, it is not necessary to deliberate at length over whether Pac-West's service conforms to some particular definition of "foreign exchange service" based upon specific provisioning arrangements. Although the Pac-West form of service differs from certain other forms of foreign exchange service in how it is provisioned, the ultimate end-user expectation remains the same, namely to achieve a local presence within an exchange other than where the customer resides. From the end-use customer's perspective, Pac-West's service is a competitive alternative to other form of foreign exchange service.

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[7] Another traditional method to provide toll-free calling is "800" service, which allows the called party to pay for incoming calls to that number. If Pac-West had provided "800" service to ISPs for calls made from Volcano or Patterson, Pac-West would have paid intercarrier switched access charges to be shared by use of their respective networks.

Typically, a customer pays more for foreign exchange service or 800 service than for basic service, to compensate the telephone company for the added costs, principally for transport incurred for the foreign exchange or 800 service. Pacific argues that while the added charges to the customer ordering foreign exchange or 800 service normally forces the customer to make rational decisions as to whether the benefits outweigh the costs, there is nothing in the pricing of the arrangement to the Pac-West ISP customer to cause the customer to make rational cost-benefit buying decisions. Pacific claims that the Pac-West ISP in Stockton wanting end-users to have free local calling from distant locations may pay almost nothing extra for the higher costs incurred by the carriers providing the service.

The fact that a CLC does not charge the end user for dedicated facilities does not necessarily negate the fact that foreign exchange service is being provided. We have previously determined that Commission regulation of tariff rates charged by CLCs is not necessary in view of CLCs' lack of market power. Therefore, we find no basis to require specific minimum rates which CLCs must charge end-users for the service to qualify as "foreign exchange." Likewise, we find no basis to require the specific title "Foreign Exchange Service"as long as the substantive intent to provide the customer with a local presence in a foreign exchange is disclosed in the CLC's tariff.

We conclude that the assigning of NXX prefixes to ISPs in the manner used by Pac-West constitutes a form of foreign exchange service from the perspective of the end user. As such, the Pac-West arrangement warrants rating of the calls from the rate center of the foreign exchange in similar fashion to more traditional forms of foreign exchange service. Accordingly, such calls would be rated as local calls if originated from a rate center within 12 miles of the rate center of the designated foreign exchange of the called party's NXX prefix.

This principle is consistent with the underlying intent of the tariffs governing the rating of calls as toll or local, applied in the context of foreign exchange service.

We agree that the pricing of services should be determined in an economically efficient manner to provide an incentive for economically rational decisions. We do not believe this result is properly achieved, however, by dictating what a CLC is to charge its end-users. Rather, we believe the CLC will set its prices to end-users in an economically rational manner if the CLC is held financially responsible to compensate other carriers for routing and delivering foreign exchange calls as provided for in the relevant interconnection agreements. We discuss the issue of intercarrier compensation separately in Section V.A. below.

The rating of a call, therefore, should be consistently determined based upon the designated NXX prefix. Abandoning the linkage between NXX prefix and rate center designation could undermine the ability of customers to discern whether a given NXX prefix will result in toll charges or not. Likewise, the service expectations of the called party (i.e., ISPs) would be undermined by imposing toll charges on such calls since customers of the ISPs would be precluded from reaching them through a local call. Consequently, the billing of toll charges for Internet access which is designed to be local could render an ISP's service prohibitively expensive, thus limiting the competitive choices for Internet access, particularly in rural areas.

The small LECs have objected to rating calls as local when terminated to an NXX prefix of a customer physically located in a separate exchange, claiming such NXX prefixes constitute a "false labeling" of the call destination. A "false labeling" implies an intent to deceive or mislead. If such labeling were used to maliciously misrepresent the actual location of the called party with an intent to defraud others, a deceptive intent could be inferred. Yet, we find nothing inherently misleading nor deceptive in the use of different rating and routing points as long as the arrangement is clearly identified to customers and in applicable interconnection agreements as a form of foreign exchange service and as long as a provision for fair intercarrier compensation is made. The designation of an NXX prefix rated from a foreign exchange is simply necessary to provide for a local presence in that exchange and still conform with the calling rating conventions as discussed above.

The independent LECs have also argued that rating of such calls as local causes the originating carrier to lose toll revenue from its customer originating the call. This argument raises two issues: (1) the loss of profit opportunities and (2) compensation for costs of providing service. To the extent that the LECs object to the local rating of calls on the basis that it results in a loss of profit opportunities through the collection of greater toll revenues, we find such objection unpersuasive. A customer is entitled to choose to make either a local call (through a foreign exchange arrangement) or a toll call based on the competitive choices available. If the customer's choice to make a local call results in lower toll revenues being collected by the serving carrier, that result is a consequence of the competitive market and is not a basis to restrict the competitive options available to the customer. The local service tariffs under which LEC customers are billed are designed to provide a reasonable compensation for the origination of calls to other local NXX prefixes.

Moreover, the loss of such toll revenue presupposes that the originating customer would still make the same call if it were rated as toll rather than local. In the case of ISPs, however, customers generally can find an ISP offering access on a toll-free basis. Thus, if a call to an ISP were rated as toll, the caller would likely not make the call in the first place, but would chose a competing ISP accessible through a local call. Internet users are unlikely to make toll calls in order to access the Internet for extended periods. Thus, given the availability of toll-free ISP alternatives, there would be no toll revenue to lose from the Pac-West service arrangement. Consequently, the Pac-West service arrangement for ISPs should not adversely impact the small LECs' toll pool revenue recovery.

If the competing ISP was also a customer of the same carrier as of the originating caller, that carrier could gain a competitive advantage by making its service more attractive for ISPs. An ISP would obviously prefer a carrier who could enable it to offer local-rated access. Conversely, the originating carrier could face competitive losses in terms of ISPs who might choose to subscribe to the competing carrier offering service to ISPs through a less costly foreign exchange arrangement. Particularly in rural regions, such a service offering enhances customer choice and affordability of Internet access, encouraging more flexible alternatives for ISPs seeking market expansion.

In summary, at least in the case of ISPs, we do not find the claims of lost toll revenue justify a deviation from accepted call rating protocols as outlined above.

The other objection raised by the small LECs involves claims that the rating of calls as local deprives them of compensation for actual costs incurred in the delivery of such calls beyond the local calling area using facilities which are designed to carry toll traffic. The proper remedy for this objection is for the LEC to seek any appropriate compensation from other carriers involved in the call delivery. Disputes over intercarrier compensation, however, do not justify exacting a toll charge from end-user customers for a call intended to be rated as local. We address intercarrier compensation below.

C. Intercarrier Compensation

1. Parties' Positions

Parties are in dispute regarding what intercarrier compensation obligations exist associated with Pac-West's serving arrangement, assuming the Commission does not prohibit the use of such arrangements as some parties propose.

Parties disagree over whether or how the actual costs incurred by carriers are impacted by changes in the routing distance of calls between the called party and the originating caller and what resulting intercarrier compensation is appropriate. CLCs filing comments generally believe the Commission should simply defer to the independent negotiation process, and not issue any policy pronouncement as to what compensation obligations may be appropriate for the sorts of foreign exchange arrangements Pac-West has offered. To the extent the Commission intends to consider rules in this regard, however, CLCs generally oppose paying any additional compensation to the ILECs. Pac-West claims, for example, that the facilities used and related costs are the same whether a call is routed over a local 12-mile distance or a longer distance within a LATA. Based on this claim, Pac-West then argues that it shouldn't have to compensate more for a call routed over the longer distance as long as the call is defined to be a local call.

Pac-West argues that its serving method has not caused other carriers to incur costs they would not otherwise have incurred, nor has it interfered with other carriers' facilities or impaired their own provision of services. Pac-West claims it has not unfairly deprived any carrier of revenues, nor, unreasonably impeded competition in any way. To the contrary, Pac-West argues, this serving method enables ISPs and others to expand their service offerings throughout California far more economically and quickly than otherwise would have been possible, thereby increasing consumers' choices for services, and enhancing the quality of services, particularly in sparsely populated rural areas where affordable high speed Internet access previously had not been available.

Pac-West argues that the facilities used by ILECs and other interconnecting carriers to originate and route traffic for completion by Pac-West, WorldCom, and other CLCs are exactly the same whether the ISP or other called party is physically located in the rate center area with which its telephone number is associated, or not. Pac-West claims that the originating carrier experiences no difference in cost, and that the appropriate rates, terms, and conditions for the exchange of traffic, in both cases, are already addressed in interconnection agreements currently on file with the Commission.

Parties representing CLCs generally argue that the Commission should not set intercarrier compensation rates for any form of foreign exchange service that ILECs or CLCs may offer, but rather that a CLC and other telecommunications carriers involved in handling the transport and/or termination of foreign exchange service calls should negotiate intercarrier compensation rates, including rates and terms for interconnection trunking, as part of interconnection agreements. Since Section 251 requires all telecommunications carriers to interconnect with each other, either directly or indirectly, all carriers are obligated to negotiate any and all requisite intercarrier rates as part of an interconnection agreement.

The CLCs argue that if the Commission sets intercarrier rates as requested by the ILECs, the ILECs will simply maintain their monopoly position, rather than negotiating fairly as called for in the Telecommunications Act. Pac-West thus draws a distinction between a carrier compensating for actual usage-sensitive incremental costs versus paying intercarrier rates which merely contribute to the fixed costs and to the additional profit margin of the ILEC.

The ILECs generally object to Pac-West's use of different rating and routing points, claiming that they are being used to avoid the payment of intercarrier compensation to the ILECs for the routing and switching of calls beyond local calling area boundaries. Pacific claims that by using the disparity between rating and routing, carriers avoid paying proper compensation to other connecting carriers in order to obtain LATA-wide local calling, causing serious financial harm to the industry because of the overuse of NPA NXX codes.

Pacific claims that the Pac-West service arrangement is actually a form of intraLATA toll-free calling, and, as such, should be subject to the same compensation provisions as all other intraLATA toll-free calls as prescribed in Pacific's various interconnection agreements. Under those agreements, compensation is to be charged by the party originating the call rather than terminating the call. Thus, under Pacific's interpretation, Pac-West—or any other CLC with a similar arrangement—would be required to pay compensation to Pacific for calls originated by Pacific's customers and terminated to the CLC's ISP customers, with the traffic being treated as intraLATA toll-free calling.

Pacific and other ILECs dispute Pac-West's claim that there are no additional costs incurred by the telephone companies that must transport the calls over longer distances beyond a local calling area, such as to Stockton from Crows Landing. Pacific argues that if the Commission continues to permit this disparity between rating and routing without proper compensation, all LECs will experience a revenue shortfall as costs increase without any compensating increase in revenue. In addition, more and more carriers will be encouraged to establish local calling areas for incoming calls to their customers that may be as large as the LATA. And each of these newly created local calling areas for incoming calls will require significant numbers of NPA NXX codes.

The Small Independent LECs claim that the present Commission policy regarding rating and routing is unjust since it requires carriers to complete calls even if they are not properly compensated. The Small Independent LECs recommend that the Commission require CLCs to arrange for interconnection and compensation arrangements with all other affected carriers before they establish exchanges with disparate routing and rating points to allow the Commission to resolve how the ILECs will replace potential lost revenues and cover the cost of completing calls to exchanges where the rating point may be local, but the routing point is distant.

2. Discussion

We conclude that, whatever method is used to provide a local presence in a foreign exchange, a carrier may not avoid responsibility for negotiating reasonable intercarrier compensation for the routing of calls from the foreign exchange merely by redefining the rating designation from toll to local.

The provision of a local presence using an NXX prefix rated from a foreign exchange may avoid the need for separate dedicated facilities, but does not eliminate the obligations of other carriers to physically route the call so that it reaches its proper destination. A carrier should not be allowed to benefit from the use of other carriers' networks for routing calls to ISPs while avoiding payment of reasonable compensation for the use of those facilities. A carrier remains responsible to negotiate reasonable compensation with other carriers with whom it interconnects for the routing of calls from a foreign exchange.

On the other hand, we do not believe that existing tariffed switched access rates such as those which Pacific charges other carriers for the transport of intraLATA toll traffic necessarily provide a fair or economically efficient basis for intercarrier compensation under the foreign exchange arrangement used by Pac-West. A requirement for CLCs to pay intercarrier compensation for foreign exchange arrangements based on such rates could serve to undermine the efficiencies which CLCs have sought to achieve through the design of their own network architecture as described above. Perpetuating the payment of such tariff charges in such instances could drive up the rates which CLCs charge to ISPs which may, in turn, be passed on to Internet end-users.

The use of the ILEC's existing switched access rates would also base intercarrier compensation on the legacy architecture which has traditionally been deployed by the ILECs. It would not promote the most economically efficient outcome simply to require the CLCs to pay currently existing tariffed switched access rates to the ILEC on the same basis as would be required for a traditional intraLATA toll call.

In short, we find that neither the position of the CLCs nor that of the ILECs provides a completely satisfactory resolution of the intercarrier compensation issue. Incumbents are entitled to fair compensation for the use of their facilities in the transport and termination of foreign exchange traffic. At the same time, it would not be competitively neutral or economically efficient to impose a system of intercarrier compensation which is exclusively tied to any one particular carrier's network architecture. Rather, the appropriate compensation arrangement should aim to be technology neutral, and should be applicable both to CLCs and to ILECs whether traffic is originating or terminating. The compensation arrangement should take into account the costs that arise from the service offered.

The means by which intercarrier compensation is determined for the mutual exchange of traffic on each others' networks is through interconnection agreements negotiated in conformance with the 1996 Telecommunications Act. Interconnection agreements typically include provisions for each carrier to compensate the other based on the respective cost of facilities used to originate, transport, switch, and terminate traffic. Different compensation provisions may apply depending on whether the call is defined as local, intraLATA toll, foreign exchange, or long distance. All such compensation, however, is tied to costs incurred or avoided.

We believe the Pac-West arrangement is equivalent to foreign exchange service, not to intraLATA toll-free calling as claimed by Pacific. Just as with other forms of foreign exchange service, the Pac-West arrangement relocates the rate center from which incoming calls are rated as either local or toll. Unlike intraLATA toll-free calling, however, the Pac-West arrangement does not permit a caller from any location to dial the ISP toll-free. The calling party would still incur toll charges if the call was made from a location whereby the rate center of the calling party was more than 12 miles from the rate center for the ISP's NXX prefix. The Pac-West arrangement is not equivalent to intraLATA toll-free calling. Therefore, a carrier thus may not claim compensation for the origination of calls by its customers to the ISPs served by a CLC under the Pac-West type of arrangement under the provisions applicable to toll-free intraLATA calling. On the other hand, a carrier may be entitled to compensation for the transport of such traffic as a form of foreign exchange service.

Of course, the complaint which initiated this inquiry involved a dispute between Pac-West and Evans and Volcano, carriers that had not executed interconnection agreements with each other. Neither Evans nor Volcano had an interconnection agreement with Pac-West because their facilities did not physically interconnect with those of Pac-West. [8] They each handed off their customers' originating traffic to Pacific for further routing ultimately destined for Stockton. As a general matter, however, any carrier that is involved in the switching or routing of calls originated by its customers over toll facilities has recourse to negotiate compensation to recover those costs under interconnection agreements with other carriers with whom it interconnects.

In any event, we find that the maximum potential relieve impacts of rating and routing differences theorized by the small LECs are overstated. Hypothetical examples posited by the small LECs suggest that a telephone message with a local rating point could be transported to a routing point as far away as Los Angeles or New York City. In reality, interconnection agreements typically limit the distance that a call may be routed within the boundaries of a single LATA. Therefore, any routing of a call with a local rating point beyond the LATA boundaries would generally not be permissible under the agreement.

What we are concerned with in this rulemaking, however, is the question of what intercarrier compensation is appropriate based on whether a call is defined as local (via the use of a foreign NXX prefix) or as toll.

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[8] In D. 97-12-094 (C.96-10-018), we authorized Evans and Volcano Telephone Companies each to file a separate application to seek compensation from Pac-West for any alleged revenue losses associated with Pac-West's provisioning of ISP Type 6 service between the date such service commenced and the resolution of these generic issues. To date, no such applications have been filed.

This issue has already arisen in previous complaints and arbitration proceedings before the Commission. Parties to various complaint and arbitration proceedings have been unable to agree on whether disparate rating and routing of calls is proper, and if so, how compensation for such calls should be arranged. Rather than repeatedly litigate the same issue in each disputed interconnection agreement, a more efficient approach is to establish generic principles in this proceeding which can be applied in specific negotiations.

We have previously adopted rules in this proceeding to be applied as preferred outcomes, while leaving parties the discretion to negotiate their own unique interconnection agreements tailored to the circumstances facing individual carriers. The adoption of preferred outcomes, has provided carriers with broad guidance and has reduced the potential for disputes between carriers. The present dispute is likewise appropriate for generic policy guidance from the Commission in the interest of minimizing future disputes and facilitating negotiations between carriers.

We conclude that all carriers are entitled to be fairly compensated for the use of their facilities and related functions performed to deliver calls to their destination, irrespective of how a call is rated based on its NXX prefix. Thus, it is the actual routing points of the call, the volume of traffic, the location of the point of interconnection, and the terms of the interconnection agreement – not the rating point – of a call which properly forms a basis for considering what compensation between carriers may be due.

We conclude, however, that the record at this point does not provide a sufficient basis to adopt appropriate preferred outcomes for intercarrier compensation arrangements for the transport and delivery of traffic involving different rating and routing points. The record shall be augmented through evidentiary hearings to determine a fair resolution of the disputes concerning intercarrier compensation for the transport and delivery of calls using NXX codes to provide locally-rated calling to customers residing beyond the local calling area of the designated NXX code. Our ultimate aim is to arrive at an intercarrier compensation arrangement which is fair to all carriers involved in the transport, switching, and delivery of calls utilizing different rating and routing points. The resulting intercarrier compensation arrangements should not result in a windfall to either ILECs nor CLCs, but should provide economically efficient price signals to stimulate a competitive market among all carriers. We shall direct the ALJ to schedule a prehearing conference to initiate this hearing process.

V. Comments on Draft Decision

The draft decision of the assigned ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code Section 311(g) and Rule 77.1 of the Rules of Practice and Procedure. Comments on the draft decision were filed on July 22, 1999, and reply comments were filed on July 27, 1999. We have taken the comments into account, as appropriate, in finalizing today's order.

Findings of Fact

1. In D.97-12-094, the Commission found that the issues raised in C.96-10-018 involved industry-wide issues which should be examined on a generic basis in this rulemaking.

2. C.96-10-094 involved a dispute over the propriety of certain rating and routing of calls as brought before the Commission in a complaint (1) filed by Pac-West Telecom, Inc., a competitive local carrier (CLC).

3. Although the generic issues raised in the Pac-West complaints have applicability to telephone number assignments generally, the dispute in the

Pac-West complaints arose specifically in the context of number assignments made to Internet Service Providers (ISPs).

4. To limit CLCs to offering foreign exchange service only in the manner traditionally used by the ILECs, is unreasonable.

5. It could be technologically and economically inefficient to require a CLC to construct switching facilities in every local exchange in which it sought to provide a local presence to its customers.

6. Various interconnection agreements between the major ILECs and CLCs already provide for the use of separate rating and routing points.

7. The interconnection agreements between the major ILECs and cellular carriers Los Angeles Cellular Telephone Company have provisions enabling cellular customers to obtain numbers for rating purposes which are located in the geographic exchange in which the cellular customer expects most of its calls even though it differs from where the customer is physically located.

8. The use of different rating and routing points does not adversely impact the 911 emergency calling system since the routing of relevant information is not based on rating points, but on separate records entered into the E-911 Database Management System.

9. Toll rates between localities are based on the airline distance between the calling and called parties' rate centers. Each rate center, in turn, is identified, by tariff, with one or more specific NXX codes.

10. The provision of foreign exchange service is a generally recognized exception to the practice of rating calls from the rate center of the exchange in which the called party resides since it is designed to relocate a called party's designated rate center for rating purposes from a home exchange to a foreign exchange.

11. Although the Pac-West form of service differs from certain other forms of foreign exchange service in how it is provisioned, the end-user expectation remains the same, namely to achieve a local presence within a foreign exchange.

12. From the end-user customer's perspective, Pac-West's service is a competitive alternative to traditional foreign exchange service.

13. Since Internet users are unlikely to make toll calls in order to access the Internet for extended periods given the availability of toll-free ISP alternatives, there would be no toll revenue to lose from the Pac-West type of service arrangement.

14. D.97-12-094 (C.96-10-018) authorized Evans and Volcano Telephone Companies each to file a separate application to seek compensation from Pac-West for any alleged revenue losses associated with Pac-West's provisioning of ISP Type 6 service.

15. The provision of a local presence using an NXX prefix rated from a foreign exchange may avoid the need for separate dedicated facilities, but does not eliminate the obligations of other carriers to physically route the call so that it reaches its proper destination.

16. The means by which intercarrier compensation is determined is through mutually negotiated interconnection agreements in conformance with the Telecommunications Act, and different compensation provisions may apply depending on whether the call is defined as local, intraLATA toll, or long distance.

17. Disputes as to how actual costs are impacted by a particular serving arrangement and how such costs should be compensated is a factual question for resolution through negotiations and/or arbitration among parties to interconnection agreements.

18. As a general matter, any carrier that is involved in the switching or routing of calls originated by its customers over toll facilities has recourse to negotiate compensation to recover those costs through wholesale charges under interconnection agreements with other carriers with whom it interconnects.

19. Interconnection agreements typically limit their applicability to the routing of calls within the boundaries of a single LATA.

20. Parties to various complaint and arbitration proceedings before this Commission have been unable to agree on whether disparate rating and routing of calls is proper, and if so, how compensation for such calls should be arranged.

21. The record in this proceeding does not provide a sufficient basis to adopt appropriate preferred outcomes for intercarrier compensation arrangements for the transport and delivery of traffic involving different rating and routing points.

Conclusions of Law

1. Carriers should not be prohibited from designating different rating and routing points for call destinations since such a prohibition could undermine the incentives for carriers to develop innovative service alternatives in the most economically and technologically efficient manner.

2. The rating of calls as toll or local should be based upon the designated rate center of the NXX prefix of the calling and called parties' numbers, even if the called party may be physically located in a different exchange from where the call is rated.

3. It is up to carriers through their negotiations to determine specifically how much they will be mutually compensated for the exchange of various kinds of traffic.

4. This rulemaking is concerned with the broad principle of what are the obligations for revenue compensation based on whether a call is defined as local

(via the use of a foreign NXX prefix) even though the routing distance may be equivalent to that of a toll call.

5. Carriers are entitled to be fairly compensated for the use of their facilities and related processing functions for the actual delivery of a call, irrespective of how a call is rated based on its NXX prefix.

6. There is nothing inherently "false" in the labeling of NXX prefixes from foreign exchanges as long as the arrangement is not used to mislead or deceive, and a fair provision for intercarrier compensation is made for the delivery of calls in the applicable interconnection agreements.

7. If the customer's choice to make a local call results in lower toll revenues being collected by the serving carrier, that result is a consequence of a competitive market and is not a basis to restrict the competitive options available to the customer.

8. The Pac-West arrangement is equivalent to foreign exchange service, but not to intraLATA toll-free calling.

9. Since the Pac-West service type of arrangement is not equivalent to intraLATA toll-free calling, on a prospective basis, carriers may not claim compensation for the origination of calls by its customers to ISPs under that arrangement under the provisions for toll-free intraLATA calling.

10. The record should be augmented through evidentiary hearings as a basis to adopt preferred outcomes concerning the proper intercarrier compensation for the transport and delivery of calls utilizing NXX codes to provide locally rated incoming calling to customers residing beyond the local calling area of the designated NXX code.

11. The proper compensation arrangement should take into account the fact that the ILECs and CLCs may use different network architectures to transport

and deliver calls, and should strike a fair balance in considering the differing network architectures used.

12. D.98-10-057 ordered that reciprocal compensation provisions of interconnection agreements are to apply to the termination of ISP traffic which would otherwise qualify as a local call measured by the distance between the rate centers of the telephone number of the calling party and the telephone number used to access the ISP modem.

INTERIM ORDER

IT IS ORDERED that:

1. The following preferred outcomes shall be used by the Commission in resolving disputes over the provisions of interconnection agreements involving the use of different rating and routing points.

2. Carriers shall not be prohibited from designating different rating and routing points for the delivery of telephone calls for purposes of providing customers a local presence within a foreign exchange.

3. The compensation exchanged between carriers related to the origination, switching, and routing of calls shall consider the actual routing points of the call, the volume of traffic, the location of the point of interconnection, and the terms of the interconnection agreement in situations where different rating and routing points are used.

4. Any currently effective interconnection agreements which are inconsistent with the principles set forth above shall be subject to renegotiation to conform to principles adopted in this rulemaking regarding rating and routing issues.

5. Calls shall be rated in reference to the rate center of the assigned NXX prefix of the called party pursuant to the conclusions of law above.

6. The assigned Administrative Law Judge is directed to convene a prehearing conference for the purpose of the defining the scope and procedural schedule for evidentiary hearings regarding intercarrier compensation among wireline carriers for the transport and delivery of calls utilizing NXX codes to provide locally-rated incoming calling to customers residing beyond the local calling area of the designated NXX code.

This order is effective today.

Dated September 2, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
JOEL Z. HYATT
CARL W. WOOD
Commissioners